TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 137.

THE FIRST NATIONAL BANK OF WELLINGTON, OHIO, PLAINTIFF IN ERROR,

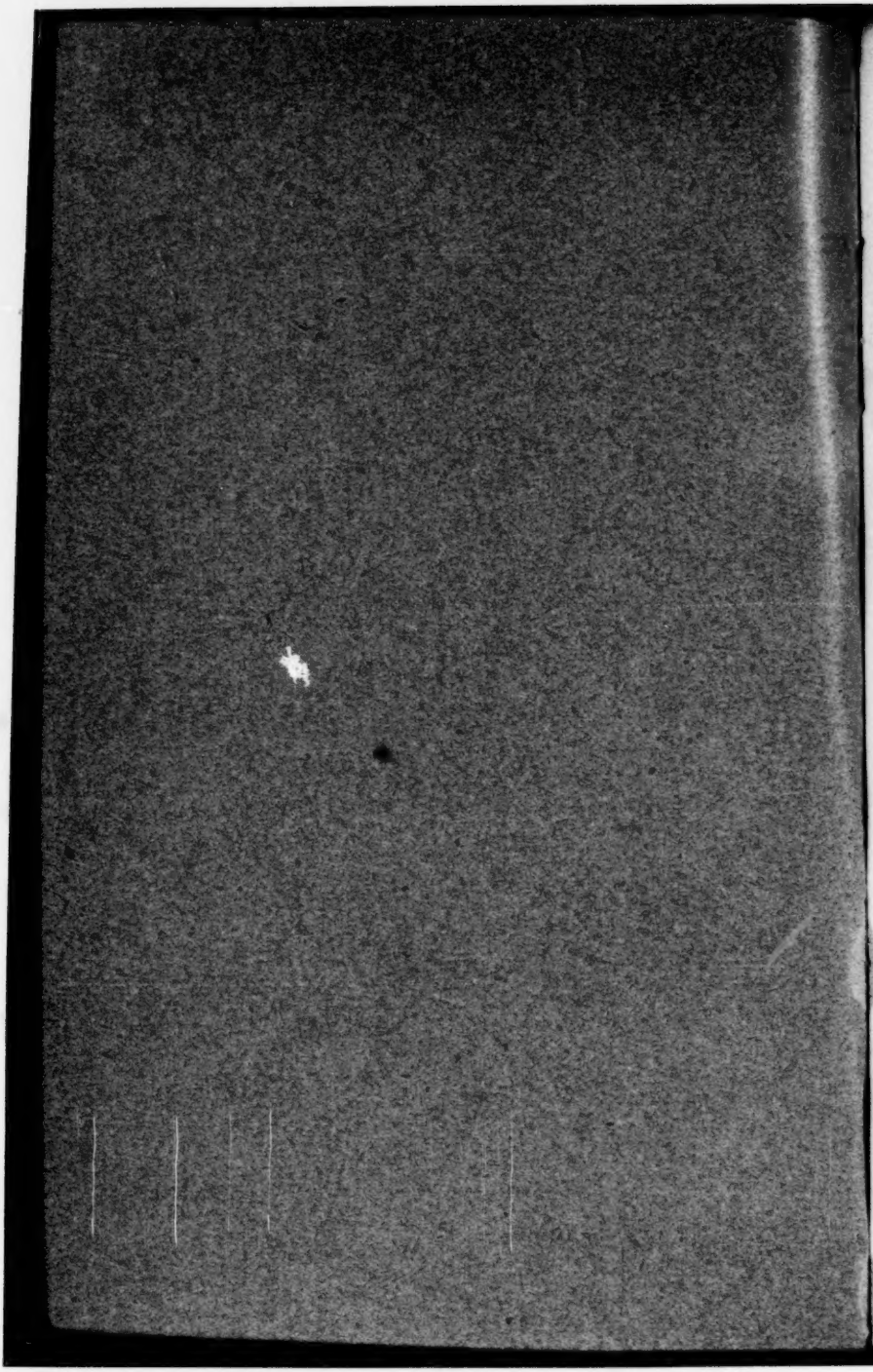
vs.

H. P. CHAPMAN, AS TREASURER OF LORAIN COUNTY, OHIO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED JULY 16, 1897.

(16,630.)



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IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

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In the Supreme Court of Ohio.

H. P. CHAPMAN, as Treasurer of Lorain County, Plaintiff in Error,
versus
THE FIRST NATIONAL BANK OF WELLINGTON, OHIO, Defendant in Error.

Record.

E. G. Johnson, attorney for plaintiff in error.
Boynton & Horr, attorneys for defendant in error.

Filed Dec. 27, 1894, in supreme court of Ohio.
J. B. ALLEN, *Clerk.*

1 *Petition in Error.*

In the Supreme Court of Ohio.

STATE OF OHIO, *Lorain County,* } ss:

In the Supreme Court.

H. P. CHAPMAN, as Treasurer of Lorain County, Plaintiff in Error,
vs.
THE FIRST NATIONAL BANK OF WELLINGTON, OHIO, Defendant in Error.

The plaintiff in error says that at the October term, A. D. 1894, by the consideration of the circuit court of Lorain county, Ohio, the defendant in error recovered a judgment against said plaintiff in error in an action then pending in said court, wherein the defendant in error was plaintiff in error and plaintiff in error was defendant in error, a transcript of the docket and journal entries whereof is filed herewith. Plaintiff in error says there is error in said record and proceedings prejudicial to the plaintiff in error apparent upon the face of the record in this, to wit:

First. Said circuit court erred in reversing the judgment of the court of common pleas in said action.

2 Second. Said judgment of the circuit court should have been in favor of the plaintiff in error instead of for the defendant in error.

Third. There are other errors prejudicial to the plaintiff in error apparent upon the face of the record.

The plaintiff in error therefore prays that said judgment of the circuit court may be reversed and plaintiff in error restored to all things it has lost thereby.

E. G. JOHNSON,
Attorney for Plaintiff in Error.

The issuing service and return of summons in error in the foregoing case is hereby waived, and the appearance of the defendant in error entered herein.

BOYNTON & HORR,
Attorneys for Defendant in Error.

Petition for Injunction.

STATE OF OHIO, *Lorain County,* } ss:

In the Court of Common Pleas.

THE FIRST NATIONAL BANK OF WELLINGTON, OHIO, Plaintiff,
vs.
H. P. CHAPMAN, Treasurer of Lorain County, Ohio, Defendant.

The plaintiff says that it is a national banking association, incorporated under and by virtue of an act of Congress, entitled "An act to provide for the national currency secured by a pledge of
3 United States bonds, and to provide for the circulation and redemption thereof," approved June 3d, 1864, and the amendments thereof, and is established and doing business in the village of Wellington, in said county and State, and that the defendant is the duly elected and qualified treasurer of the county of Lorain, State of Ohio.

The defendant says that it has a capital stock of $100,000.00, divided into 1,000 shares of $100 each, all of which are fully paid up, and certificates for the shares are outstanding and owned by a large number of persons; that in accordance with section 2765 of the Revised Statutes of Ohio, then and now in force, the cashier of the plaintiff duly reported in duplicate to the auditor of said county the resources and liabilities of said banking association at the close of business on the Wednesday next preceding the second Monday of May, 1893, together with a full statement of the names and residences of the shareholders therein, with the number of shares held by each and the par value thereof, as required by said section; that included in said return so made by said cashier, was the real estate owned by the plaintiff, valued at $3,420.00, separately assessed and charged on the tax duplicate of said county; that thereupon said auditor proceeded as required by section 2766 of the Revised Statutes of Ohio, to fix the total value of such shares according to their true value in money, and fixed the same at $74,710.00, exclusive of the assessed value of its real estate, and made out and transmitted to the annual board of equalization of incorporated banks, a copy of the report so made by said cashier, together with the valuation of such shares as was fixed by said auditor; that said State board of equalization, acting under sections 2808 and 2809 of the Revised Statutes of Ohio, did examine the return aforesaid made by said cashier to said county auditor, and the value of such shares as fixed by said county auditor, and did pretend to equalize said
4 shares to their true value in money, and fixed the valuation thereof at $74,710.00 exclusive of the assessed value of its

real estate, and both said auditor and State board of equalization did fix and establish a much higher value for taxation upon and for the shares of the capital stock of the plaintiff than upon other moneyed capital in the hands of individual citizens of the State, by refusing and disallowing any such deduction of the *bona fide* indebtedness of said capital stock, from the valuation of said shares so fixed for taxation, as is allowed to individual and other citizens of the State, on moneyed capital invested in the credits and securities hereinafter more particularly defined; and the auditor of the State did certify said valuation to the said auditor of said county of Lorain, which said auditor of said county did enter upon the tax duplicate of said county for the year 1893, with said deductions disallowed; that in estimating the value of the stock of the plaintiff's stockholders, the business and franchise of said bank are and were considered as a large element of value, and the value of said shares was largely increased by reason and in consequence thereof, while the shares of stock in nearly all domestic corporations of the State of Ohio are, by the statute of the State, expressly exempted from taxation, the tax required being one levied and placed upon the property in which the company's capital is invested exclusive of its franchise—creating by such inclusion of the franchise in the value fixed upon the shares of plaintiff, while excluding it in the estimate of the value of the corporate property of other corporations, a discrimination prohibited by the act of Congress.

The plaintiff further says that all unincorporated banks and banking companies, and private individuals of said State, engaging in banking, are expressly authorized by the statute of Ohio to deduct their *bona fide* debts from all their legal claims and demands, a right not given to the plaintiff's shareholders nor provided for them by any law of Ohio, but denied to said shareholders in the estimate of value of said shares by the auditor and State board of equalization, in refusing deductions on account of the shareholders' indebtedness.

The plaintiff further avers that by section 2730 of the Revised Statutes of Ohio, it is enacted that:

"The term 'credits' shall be held to mean the excess of the sum of all legal claims and demands, whether for money or other valuable things, or for labor or service due or to become due to the persons liable to pay taxes thereon, including deposits in banks, or with persons in or out of the State, other than such as are held to be money as hereinbefore defined, when added together (estimating every such claim or demand at its true value in money) over and above the sum of legal *bona fide* debts owing by such persons."

The plaintiff further says and avers that a large amount of moneyed capital in the hands of individual citizens of the State and of said county of Lorain, invested in promissory notes aad other legal obligations, securities, claims and demands, is, by the aforesaid provision, allowing a deduction of legal *bona fide* debts to be made therefrom, expressly exempted from taxation, thereby making an unjust and unlawful discrimination against moneyed capital invested in national bank shares, as to which no exemption or deduction is

provided for by the laws of the State, which discrimination is in direct violation of the restrictions of said section 5219 of the Revised Statutes of the United States, which provides that:

"The taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State."

The plaintiff further avers and shows that the following names, stockholders of said bank, were, on the said day next preceding the second Monday of April, A. D. 1893, the owners of
6 the number of shares of stock of said bank set opposite their respective names, to wit:

S. S. Warner	150 shares.
R. A. Horr	10 shares.
W. Cushion, Jr	50 shares.
C. W. Horr	120 shares.
O. P. Chapman	10 shares.
E. F. Webster	10 shares.
W. R. Wean	20 shares.
S. K. Laundon	120 shares.

The said shares were valued by said State board of equalization for taxation for the year 1893, at $36,607.90, and certified by said board to the auditor of Lorain county as the taxable value of the same; that the rate of taxation for all taxes assessed and collected for the year 1893, within said county and village, was $0.0255 on a dollar's valuation, and amounted on said value of said shares to $933.50.

The plaintiff further says that on said day next preceding the second Monday of April, A. D. 1893, and at the time the cashier of said banking association made return to the auditor of said county, of the names and residences of the shareholders of said association with the numbers and the par value of the shares of the capital stock of said banking association, for the year 1893, to wit: between the first and second Mondays in May of said year, each of said above-named shareholders was indebted and owing to others of legal *bona fide* debts, a sum in excess of the credits from which, under the laws of Ohio, he was entitled to deduct said debts to an amount equal to the value of said shares, which said excess of said debts over credits as aforesaid, the said stockholders above named were entitled to have deducted from the assessed value of said shares so severally owned by them, proof of which fact was duly made to said
7 auditor and said State board of equalization by the shareholders at the time that they respectively fixed the valuation of said shares of stock.

And the plaintiff further says that both the auditor of said county and of the State board of equalization for banks, refused to allow the deduction of any indebtedness of said stockholders from the value of said shares, and made up and fixed the valuation of said shares in entire disregard of the right or claim of said shareholders to said deduction; and the said auditor has carried upon

the duplicate delivered to the treasurer, the entire valuation of said shares so made without allowing and expressly refusing to allow any deduction therefrom by reason of any *bona fide* indebtedness of said shareholders to others.

The plaintiff further avers that by section 2839 of the Revised Statutes of Ohio, it is declared, that:

"Any taxes assessed on any shares of stock or the value thereof, of any bank or banking association, shall be and remain a lien on such shares from the first Monday in May in each year, until such taxes are paid, and in case of non-payment of such taxes at the time required by law, by any shareholder, and after notice received of the county treasurer of the non-payment of such taxes, it shall be unlawful for the cashier or other officer of such bank or banking association, to transfer or permit to be transferred, the whole or any portion of said stock until the delinquent taxes thereon, together with costs and penalties, shall be paid in full, and no dividend shall be paid on stock so delinquent, so long as such taxes, penalties or costs, or any part thereof, remain due and unpaid."

The plaintiff says that said defendant further threatens, in case of non-payment of said taxes so unlawfully added, to give the notice so provided for in said section, and thereby prevent
8 the transfer of any of said shares of stock from said stockholders or any other persons, to whom they or either of them may have sold the same.

The plaintiff further says that if the shares of said stockholders are permitted to be sold under the lien created on them by said section 2839 of said Revised Statutes of Ohio, or otherwise, irreparable injury would not only be done to each of the shareholders, but also to the plaintiff, and it would thereby be subjected to great loss of standing and credit, for the redress of which the law affords no remedy, and the franchises with which your orator is invested by the act of Congress, as aforesaid, would be greatly impaired in value; and the disability imposed upon the plaintiff to make transfers or to pay dividends of, or upon, shares, upon which such illegal tax remains unpaid, would injuriously affect all its ordinary business, and introduce confusion and uncertainty into its transactions, and the consequent loss of public confidence, upon which its success depends; and if the plaintiff should pay such illegal taxes and attempt to deduct the amount from dividends or other funds of the shareholders in its hands, it would be subjected to a great multiplicity of suits brought by its separate shareholders by so doing, and in any event, a great number of suits would be rendered necessary to adjust the rights of all the parties, and the plaintiff would be subjected to great expense and irreparable injury thereby. The plaintiff says that by due authority of law said defendant has entrusted to the plaintiff the collection of certain taxes due to said treasurer, its own tax amongst them, and under the agreement that it would remit said taxes so collected on December 30th, 1893; that unless enjoined by this court, said defendant would demand of the plaintiff on December 30th, 1893, the whole one-half of the said tax so standing on his duplicate against said plaintiff.

The plaintiff further says that on the 28th day of December, A. D. 1893, it tendered to said defendant at his office as treasurer of said county, in lawful money of the United States, the entire tax due from the said shareholders of the plaintiff on their respective shares of stock, to wit: $485.80; which said defendant refused to receive unless said plaintiff would also pay the unlawful tax on the shares of stock from which said deductions as aforesaid, are authorized and required; and the plaintiff, now and here, brings into court the sum due said defendant as such treasurer, for the tax lawfully levied on said shares against the plaintiff's said shareholders, and submits and subjects the same to the order and direction of the court.

Wherefore, the plaintiff prays that the said defendant and his successor in office, may be enjoined during the pendency of this suit, from collecting or attempting to collect from the plaintiff or its said individual stockholders, by distraint or otherwise, any of said taxes as the same stand charged upon the duplicate, and that said defendant and his successor in office, may be decreed to receive in full of said taxes the sum so tendered by the plaintiff and so brought into court, and that said injunction may be made perpetual, and that on the final hearing of this cause said defendant be perpetually enjoined from attempting to collect the remainder of said taxes, being the portion so illegally assessed, and for such other and further relief as the plaintiff may be entitled to.

BOYNTON & HORR,
Attorneys for Plaintiff.

STATE OF OHIO, }
Cuyahoga County, } *ss:*

Norton T. Horr, being first duly sworn, says that he is the only authorized attorney of the plaintiff in the foregoing action; that said plaintiff is a corporation, domiciled in Lorain county, Ohio, and that the facts stated in the foregoing petition are true.

NORTON T. HORR.

Sworn to before me and in my presence subscribed this 28th day of December, A. D. 1893.

LELAND INGERSOLL,
Notary Public.

STATE OF OHIO, *Lorain County,* } ss:

In the Court of Common Pleas.

THE FIRST NATIONAL BANK OF WELLINGTON, OHIO, Plaintiff,
vs.
H. P. CHAPMAN, as Treasurer of Lorain County, Ohio, Defendant.

Precipe.

To the clerk:

Issue summons in the above-entitled action to sheriff of Lorain county, returnable according to law. Action for injunction and equitable relief.

BOYNTON & HORR,
Attorneys for Plaintiff.

I hereby acknowledge due notice of an application in this case for a temporary injunction to be made at 1.00 p. m., December 28th, 1893, to Judge D. J. Nye, at the court-house, Elyria, Ohio.

H. P. CHAPMAN, *Treasurer.*

11

Answer.

STATE OF OHIO, *Lorain County,* } ss:

In the Court of Common Pleas.

THE FIRST NATIONAL BANK OF WELLINGTON, OHIO, Plaintiff,
vs.
H. P. CHAPMAN, Treasurer of Lorain County, Ohio, Defendant.

For answer to the petition of said plaintiff, the defendant says, not denying that he is the treasurer of Lorain county, nor that plaintiff is a national banking association, incorporated under an act of Congress; nor that it has a capital stock of $100,000, divided into 1,000 shares of $100 each, all of which are paid up; nor that certificates for such shares are outstanding, and owned by a large number of persons; nor that the cashier of plaintiff made a report of the resources and liabilities of plaintiff as they existed on the Wednesday next preceding the second Monday of May, 1893, together with the names and residences of the shareholders therein, the number of shares held by each, and the par value thereof; nor that the assessed value of the real estate owned by plaintiff was included therein; nor that the auditor of said county, as required by law, fixed the total value of said shares, according to their true value in money, at $74,710, exclusive of the assessed value of said real estate; nor that he transmitted the same to the annual board of equalization of incorporated banks, with a copy of said cashier's report, and the valuation of the shares so fixed by him; nor that said State board of equalization, acting in accordance with law, did equalize the assessment of said bank and fix the valuation thereof

at $74,710, not including the value of their real estate; nor that the auditor of State did certify said valuation to the auditor of
12 said county; nor that said auditor did enter the same upon the tax duplicate of said county for the year 1893, disallowing the deductions claimed; nor that the several stockholders named in the petition owned the number of shares respectively, as in the petition set forth; nor that said shares were valued for taxation for the year 1893 at 36,607.90; nor that the same was placed upon the tax duplicate of Lorain county at that valuation; nor that the rate of taxation in said village is correctly stated in the petition; nor that the tax assessed against said shares is correctly stated; nor that said board of equalization, nor the auditor of said county, refused to allow the deduction claimed by the said shareholders; nor that he placed upon the duplicate the entire valuation of said shares, as was so fixed; nor that the several sections of the statute of Ohio are, so far as cited, correctly stated in said petition; nor that plaintiff intends to avail himself of all legal measures provided for the collection of the taxes so assessed. He denies each and every other allegation and averment in said petition contained, and prays judgment that said petition may be dismissed, and for other proper relief.

E. G. JOHNSON,
Defendant's Attorney.

STATE OF OHIO, } ss:
Lorain County, }

H. P. Chapman, being first duly sworn, says that he is the treasurer of Lorain county; that he believes all the facts stated in the foregoing answer to be true.

H. P. CHAPMAN.

Signed in my presence and sworn to before me this 16th day of January, A. D. 1804.

I. H. GRISWOLD,
Notary Public.

13 *Certificate of Journal Entries.*

Circuit Court.

THE STATE OF OHIO, } ss:
Lorain County, }

In the Court of Common Pleas.

THE FIRST NATIONAL BANK OF WELLINGTON, OHIO, Plaintiff, }
vs.
H. P. CHAPMAN, Treasurer, Defendant. }

I, H. J. Lewis, clerk of the court of common pleas, within and for the county of Lorain, do hereby certify that the following entries and judgments are truly copied from the docket and journal of said court, to wit:

At the October term, 1893, on the motion of plaintiff by its attorney, and good cause being shown therefor, it is ordered that on an undertaking being given in the sum of two thousand dollars with sureties to the approval of the clerk, an injunction be allowed to issue herein, enjoining the said defendant from collecting or attempting to collect from the plaintiff or its individual stockholders named in the petition, by distraint or otherwise, any of the taxes as the same stand charged upon his duplicate for 1893, on the 490 shares owned by said named stockholders. Ordered that said defendant may without prejudice receive the $485.80 due December 30th, 1893, and $485.80 due June 20, 1894. The above order is to be in force until the further order of this court.

At the February term, 1894. At this term this cause is continued.

At the May term, 1895. At this term the parties appearing, this cause came on for hearing and was submitted to court upon
14 the pleadings and evidence, and the court being fully advised in the premises, on the request of the plaintiff that its conclusions of fact be separately stated from its conclusions of law, finds as its conclusions of fact as follows:

First. Plaintiff is a national banking association, incorporated under and by virtue of an act of Congress, entitled "An act to provide for the national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof." Approved June 3d, 1864, and the amendments thereof, and is established and doing business in the village of Wellington, county of Lorain, and State of Ohio.

Second. The defendant is the duly elected and qualified treasurer of the county of Lorain and State of Ohio.

Third. The plaintiff has a capital stock of $100,000, divided into 1,000 shares of $100 each, all of which are fully paid up, and certificates for the shares are outstanding, and owned by a large number of persons.

Fourth. That in accordance with section 2765 of the Revised Statutes of Ohio, then and now in force, the cashier of plaintiff duly reported in duplicate to the auditor of said county the resources and liabilities of said banking association, at the close of business on the Wednesday next preceding the second Monday of May, 1893, together with a full statement of the names and residences of the shareholders therein, with the number of shares held by each, and the par value thereof, as required by said section; that included in said return so made by said cashier, was the real estate owned by the plaintiff, valued at $3,420, separately assessed and charged on the tax duplicate of said county; that thereupon said auditor proceeded as required by section 2766, of the Revised Statutes of Ohio, to fix the total value of said shares according to their true value in money, and
fixed the same at $74,710.00, exclusive of the assessed value
15 of plaintiff's real estate, and made out and transmitted to the annual board of equalization of incorporated banks a copy of the report so made by said cashier, together with the valuation of such shares as was fixed by said auditor; that said State

board of equalization, acting under sections 2808 and 2809, of the Revised Statutes of Ohio, did examine the return aforesaid, made by said cashier to said county auditor, and the value of such shares as fixed by said county auditor, and did equalize said shares to their true value in money, and fixed the valuation thereof at $74,710.00, exclusive of the assessed value of plaintiff's real estate, and the auditor of said State did certify said valuation to the auditor of said county of Lorain, which said auditor of said county did enter upon the tax duplicate of said county for the year 1893.

Fifth. That the following-named stockholders of said bank were on the said day next preceding the second Monday of April, 1893, the owners of the number of shares of stock of said bank set opposite their respective names, to wit:

S. S. Warner	150 shares.
R. A. Horr	10 shares.
W. Cushion, Jr.	50 shares.
C. W. Horr	120 shares.
O. P. Chapman	10 shares.
E. F. Webster	10 shares.
W. R. Wean	20 shares.
S. K. Laundon	120 shares.

That said shares were valued by said State board of equalization for the year 1893, at $36,607.90 and certified by said board to the auditor of Lorain county as the taxable value of the same; that the rate of taxation for all tax assessed and collected for the year 1893 within said county and village was $0.0255 on a dollar's valuation, and amounted on said value of said shares to $933.50.

16 Sixth. That on said day next preceding said second Monday of April, 1893, and at the time the cashier of said banking association made return to the auditor of said county of the names and residences of the shareholders of said association, with the numbers and par value of the shares of capital stock of said banking association for the year 1893, to wit: between the first and second Mondays of May of said year each of said above-named shareholders was indebted and owing to others of legal *bona fide* debts a sum in excess of the credits, from which under the laws of Ohio, he was entitled to deduct said debts to an amount equal to the value of said shares. That proof of said indebtedness was duly made to said auditor by the shareholders aforesaid at the time that the valuation of said shares of stock was so fixed by him, and that said auditor refused to allow the deduction of any indebtedness of said shareholders from the value of said shares, as so fixed by said board of equalization, and the auditor of said county carried upon the duplicate delivered to the treasurer, the entire valuation of said shares so made without allowing any deductions therefrom, by reason of any *bona fide* indebtedness of said shareholders to others, from the valuation so fixed by said board of equalization.

Seventh. That the plaintiff tendered to said treasurer of Lorain county on the 28th day of December, 1893, and offered to pay to said treasurer the sum of $185.80, if he would receive the same in

full for the tax assessed upon the valuation of the shares of stock owned by the shareholders named in the petition for the entire year of 1893, and said treasurer refused to accept the same, and said treasurer intends, if not enjoined by this court, to use all lawful means for the collection of said tax so assessed upon the valuation of said shares of stock.

And as its conclusions of law upon the above-found facts,
17 the court find that the plaintiff is not entitled to an injunction, as prayed for in the petition, and that said petition should be dismissed. To which conclusions of law the plaintiff excepts.

It is therefore considered, adjudged and decreed by the court that the petition be dismissed; that the said defendant go hence without day, and that defendant recover from the plaintiff his costs herein, taxed at $—, to which judgment and decree the plaintiff excepts. And thereupon plaintiff gave notice of *their* intention to appeal this case to the circuit court of Lorain county, and the court fixes the amount of the bond at $200.

STATE OF OHIO, }
Lorain County, } *ss:*

I, H. J. Lewis, clerk of the court of common pleas, in and for said county, do hereby certify that the above is a true transcript of the docket and journal entries of said court in the above-entitled cause, and I further certify that the papers herewith sent are the original papers and pleadings filed in the above cause of The First National Bank of Wellington, Ohio, plaintiff, against H. P. Chapman, treasurer, defendant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court of common pleas, at the court-house,
[SEAL.] in Elyria, Ohio, on this 20th day of August, A. D. 1894.

H. J. LEWIS, *Clerk,*
By M. E. FISHER,
Deputy Clerk.

18 *Petition in Error.*

In the Circuit Court of Lorain County.

THE FIRST NATIONAL BANK OF WELLINGTON, Plaintiff, }
vs.
H. P. CHAPMAN, Treasurer of Lorain County, Defendant. }

Now comes the plaintiff and complains of the defendant for that by the consideration of the court of common pleas, within and for said county, at its May term, 1894, the defendant, by the consideration of said court, recovered a judgment against the plaintiff in an action therein pending, wherein the plaintiff in error was plaintiff, and defendant in error was defendant, a true copy of the record, judgment and proceedings in which case, together with the original pleadings and papers in the case, is herewith filed, and made a part of the petition in error.

The plaintiff alleges that there is error in the said record and judgment in this, to wit:

1st. The court erred in rendering judgment in favor of the defendant in error on the special finding of facts made in said case.

2d. The judgment upon said record ought to have been given for the plaintiff in error instead of for the defendant in error.

Wherefore the plaintiff prays that the judgment of said court of common pleas may be reversed, and that it may have final judgment given in its favor upon the record in said cause.

BOYNTON & HORR,
Attorneys for Plaintiff.

The issuing and service of summons in the above case in error are hereby waived, and the appearance of defendant entered therein.

August 6th, 1894.

H. P. CHAPMAN, *Treasurer,*
By E. G. JOHNSON,
His Attorney.

19 *Transcript of Journal Entries to Supreme Court.*

STATE OF OHIO, } ss:
Lorain County, }

In the Circuit Court.

THE FIRST NATIONAL BANK OF WELLINGTON, Plaintiff, }
vs.
H. P. CHAPMAN, Treasurer, Defendant. }

I, H. J. Lewis, clerk of the circuit court, within and for the county of Lorain, do hereby certify that the following entries and judgments are truly copied from the journals of said court, to wit:

The said parties appeared by their attorneys, and this cause came on to be heard upon the petition in error of the said plaintiff in error herein, together with the original papers and pleadings, and a duly certified transcript of the orders and judgment of the court of common pleas, together with the special findings of fact filed therewith, mentioned and referred to in said petition in error, and was argued by counsel. Upon consideration whereof the court find that in the record and proceedings aforesaid there is error manifest upon the face of the record to the prejudice of the plaintiff in error, in this, to wit: Judgment was given for the defendant on said special findings of fact when the same ought to have been given for the plaintiff.

It is therefore considered and adjudged that the judgment of the court of common pleas in said action be, and the same is hereby reversed; and this court proceeding to render the judgment said court of common pleas should have rendered, do order, adjudge and decree that the said defendant and his successor, or successors, in office be, and they are hereby perpetually enjoined from proceed-

ing in any manner to collect the said taxes described in said
20 petition and asked to be enjoined, or any part thereof. It is further ordered that said defendant pay the costs of said action in the court of common pleas and of this proceeding in error, to which order and judgment of reversal and judgment given in the case, the defendants excepts. That a special mandate be sent to the said court of common pleas to carry this judgment and order for costs into execution.

THE STATE OF OHIO, }
Lorain County, } *ss:*

I, H. J. Lewis, clerk of the circuit court, in and for said county, do hereby certify that the foregoing is a true transcript of the journal entries of said court in the above-entitled cause, and I further certify that the papers herewith sent, numbered from one up to —, are the original papers and pleadings filed in the above cause of The First National Bank of Wellington, plaintiff, against H. P. Chapman, treasurer, defendant.

In testimony whereof, I hereunto set my hand and affix
[SEAL.] the seal of said circuit court, at the court-house in Elyria, Ohio, on this 14th day of December, A. D. 1894.

H. J. LEWIS, *Clerk,*
By M. E. FISHER,
Deputy Clerk.

21 THE STATE OF OHIO, }
City of Columbus, } *ss:*

In the Supreme Court of Ohio, January Term, A. D. 1897.

Certified Transcript of Docket and Journal Entries.

In the record and proceedings then and there had and held, among other things is the following, to wit:

H. P. CHAPMAN, as Treasurer of Lorain County, Plaintiff in Error, *vs.* THE FIRST NATIONAL BANK OF WELLINGTON, Ohio, Defendant in Error.	#4332. Error to the Circuit Court of Lorain County.

Dec. 27, 1894. Petition in error and waiver of summons filed.
" " " Circuit court transcript filed.
" " " Original papers and printed record filed.
" 31, " Proof of service of printed record filed.
Feb. 21, 1896. Plaintiff's printed briefs filed.
" 25, " Proof of service of plaintiff's printed briefs filed.
Mar. 26, " Defendant's printed briefs and proof of service filed.
Dec. 26, " Plaintiff's reply briefs filed.
Jan'y 2, 1897. Proof of service plaintiff's reply briefs filed.
Ap'l 6, " Printed brief of F. S. Monnett, att'y general, filed.
" 27, " Journal entry:

"This cause came on to be heard upon the transcript of the record of the circuit court of Lorain county and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court that the judgment of the said circuit court of Lorain county be, and the same is hereby, reversed; and, proceeding to render such judgment as the said circuit court should have rendered, it is ordered
22 and adjudged that the judgment of the court of common pleas of Lorain county in this case be, and it hereby is, affirmed; and it is hereby certified that in rendering judgment in this case it was necessary to construe section 5219 of the Revised Statutes of the United States, and that upon the record and in the briefs and oral arguments of counsel for The First National Bank of Wellington, defendant in error, it was claimed and relied upon that under section 5219 the shares of said eight shareholders of said bank should not be taxed at all, for the reason that said shareholders each owed legal *bona fide* debts over and above the value of all his credits and the value of said shares so by him owned combined, and this court in this judgment decided and held against said construction of said section as so claimed by counsel for said defendant in error upon the ground and for the reasons stated in the opinion of the report of this case. It is further ordered that the said defendant in error pay the costs made in this court and in the circuit court, and, in default, that execution issue therefor; and this case is remanded to the court of common pleas for execution.

Ordered that a special mandate be sent to the court of common pleas of Lorain county to carry this judgment into execution.

Ordered that a copy of this entry be certified to the clerk of the circuit court of Lorain county "for entry."

Order Book No. 15, page 298.

May 4, 1897. Mandate issued.
" " " Original papers sent to clerk.
" " " Printer's receipted bill for printing record filed.

23 In the Supreme Court of the State of Ohio.

H. P. CHAPMAN, as Treasurer of Lorain County, Ohio, Plaintiff,
vs.
THE FIRST NATIONAL BANK OF WELLINGTON, Ohio, Defendants.
} Petition for Writ of Error.

Now comes The First National Bank of Wellington, Ohio, defendant herein, and says that on or about the 27th day of April, 1897, this court entered judgment herein in favor of the plaintiff and against this defendant, in which judgment and proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this defendant prays that a writ of error may be issued in this behalf to the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

WASHINGTON W. BOYNTON,
Attorney for the Defendant.

24 [Endorsed:] H. P. Chapman, as treasurer, etc., *vs.* First National Bank of Wellington. Petition for writ of error.

25 In the Supreme Court of the State of Ohio.

H. P. CHAPMAN, as Treasurer of Lorain County, Ohio, Plaintiff,
vs.
THE FIRST NATIONAL BANK OF WELLINGTON, Ohio, Defendant.
} Assignment of Errors.

The defendant in this action, in connection with its petition for a writ of error, makes the following assignment of errors, which it avers occurred upon the hearing of this cause in this court:

1. The court erred in entering judgment in favor of the plaintiff against the defendant on the special finding of facts made in the court of common pleas.

2. The court erred in reversing the judgment of the common pleas court of said county.

3. The court erred in holding and deciding that the stockholders of the defendant named in the original petition were not entitled, under and by virtue of section 5219 of the Revised Statutes of the United States or otherwise, to deduct their *bona fide* debts from the value of their shares of stock of the capital of the defendant to determine the valuation of said shares for taxation.

WASHINGTON W. BOYNTON,
Attorney for Defendant.

26 [Endorsed:] H. P. Chapman, as treasurer, *vs.* First National Bank of Wellington. Defendant's assignment of errors.

27 In the Supreme Court of the State of Ohio.

H. P. CHAPMAN, as Treasurer of Lorain County, Ohio, Plaintiff,
vs.
THE FIRST NATIONAL BANK OF WELLINGTON, Ohio, Defendant.
} Order Allowing Writ of Error.

This 26th day of June came the defendant, by its attorney, and filed herein and presented to the court its petition praying for the allowance of a writ of error intended to be urged by it; praying also that a transcript of the record, proceedings, and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the court does allow the writ of error upon the defendant giving bond, according to law, in the sum of two thousand dollars, which shall operate as a supersedeas bond.

JACOB F. BURKET,
Chief Justice of the Supreme Court of Ohio.

28 [Endorsed:] Order allowing writ of error.

29 In the Supreme Court of the State of Ohio.

H. P. CHAPMAN, as Treasurer of Lorain County, Ohio, Plaintiff,
vs.
THE FIRST NATIONAL BANK OF WELLINGTON, Ohio, Defendant.
} Bond on Writ of Error.

Know all men by these presents that we, The First National Bank of Wellington, Ohio, as principal, and P. M. Spencer, as sure*ties*, are held and firmly bound unto the plaintiff, H. P. Chapman, as treasurer of Lorain county, Ohio, and his successors in that office, in the full and just sum of two thousand dollars, to be paid to the said plaintiff, H. P. Chapman, as such treasurer, his attorneys or successors; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 26th day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas lately, in the supreme court of the State of Ohio, in a suit depending in said court between H. P. Chapman, as treasurer of Lorain county, Ohio, plaintiff, and The First National Bank of Wellington, Ohio, defendant, a judgment was rendered against the said First National Bank of Wellington, Ohio, and the said The First National Bank of Wellington, Ohio, having obtained a writ of

error and filed a copy thereof in the clerk's office of the said supreme court of Ohio to reverse the judgment in the aforesaid suit, and a citation directed to the said H. P. Chapman, as treasurer of Lorain county, Ohio, citing and admonishing him to be and appear as a term of the Supreme Court of the United States to be held at the city of Washington, District of Columbia, on the 1st day of August next:

Now, the condition of the above obligation is such that if the said The First National Bank of Wellington, Ohio, shall prosecute said writ of error to effect and answer all damages and costs if it failed to make the said plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

[BANK SEAL.] THE FIRST NATIONAL BANK OF WELLINGTON, OHIO,
By S. S. WARNER, *Pt.*
P. M. SPENCER.

Sealed and delivered in the presence of—
H. E. GREEN.
T. W. HILL.

30 *Writ of Error.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Ohio, Greeting:

Because — the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Ohio, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between H. P. Chapman, as treasurer of Lorain county, Ohio, and the First National Bank of Wellington, Ohio, wherein was drawn in question the validity of an authority exercised under a statute of said State, on the ground of its being repugnant to the laws of the United States, and the decision was in favor of the validity of such authority so exercised, and wherein was drawn in question the construction of a statute of the United States and the decision was against the right, privilege, and exemption specially set up and claimed under such statute, a manifest error hath happened, to the great damage of the said The First National Bank of Wellington, Ohio, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all the things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 1st day of August, 1897, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme

Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the said Supreme Court, the 26th day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

Seal of the Circuit Court, Northern Dist. of Ohio.

IRVIN BUFORD, *Clerk*,
By JNO. VAN NOSTRAN, *Deputy*.

Allowed by—
JACOB F. BURKET,
Chief Justice of the State of Ohio.

31 [Endorsed:] Writ of error.

32 STATE OF OHIO, *City of Columbus*, } ss:

Supreme Court of Ohio.

I, Josiah B. Allen, clerk of the supreme court of the State of Ohio, do hereby certify that the foregoing transcript of docket and journal entries in the case of H. P. Chapman, as treasurer of Lorain county, plaintiff in error, against The First National Bank of Wellington, Ohio, defendant in error, No. 4332, is truly taken and correctly copied from the records of said court, to wit, from Minute Book No. 17, page 46, and Order Book No. 15, page 298; that the foregoing petition for writ of error, defendant's assignment of errors, order allowing writ of error, bond, and writ of error are true and correct copies thereof and a part of the record in this cause; that the opinion hereto attached is a true and correct copy of the opinion delivered by the said supreme court, and that the copy of printed record also hereto attached is a true copy of the record filed in this court.

In witness whereof I have hereunto subscribed my name and affixed the seal of said supreme court this thirtieth day of June, A. D. 1897.

Seal of the Supreme Court of the State of Ohio.

JOSIAH B. ALLEN, *Clerk*,
By CHAS. C. PICKERING, *Deputy*.

33 H. P. CHAPMAN, as Treasurer of Lorain County,
v.
THE FIRST NATIONAL BANK OF WELLINGTON.

Taxation—National bank shares—Holder of must pay tax on assessed value—No deduction of debts.—In the administration of our tax laws, the holder of national bank shares has no right under the statutes, State and national, to deduct his legal *bona fide* debts from the value of such shares, but he is legally bound to pay tax upon the assessed value of such shares without deduction on account of such debts. Niles *v.* Shaw, 50 Ohio St., 370, followed and approved.

(Decided April 27, 1897.)

Error to the circuit court of Lorain county.

The First National Bank of Wellington, plaintiff below, filed its petition against H. P. Chapman, county treasurer, seeking to enjoin the collection of $933.50 of taxes on the value of 390 shares of stock in said bank owned and held by eight of its stockholders.

The bank averred that its cashier had made the proper return to the county auditor for the year 1893, and with said return had filed the affidavits of said eight stockholders that their debts amounted to more than their credits and bank shares combined, and that they should be allowed to deduct their debts from said shares, and that they should not be taxed on said shares. The bank further averred that the auditor refused to allow them to deduct their debts from the value of the bank shares, and taxed them upon said shares for the assessed value thereof without deduction of debts, and that the tax so assessed on said shares amounted to the sum of $933.50.

The petition of the bank further avers that the county treasurer is about to proceed and enforce collection of said taxes against said eight stockholders by such process as is authorized by the laws of Ohio, including section 2839 of the Revised Statutes of this State, which is set out in full.

34 The petition also sets out so much of section 2730, Revised Statutes, as defines the term "credits," and avers that all unincorporated banks and banking companies, and private individuals of said State engaged in banking, are expressly authorized by the statute of Ohio to deduct their *bona fide* debts from all their legal claims and demands.

This last averment is denied by the answer of the treasurer.

The petition also avers that a large amount of moneyed capital in the hands of individual citizens of the State and of said county of Lorain, invested in the promissory notes and other legal obligations, securities, claims and demands, is, by the aforesaid provision, allowing a deduction of legal *bona fide* debts to be made therefrom, expressly exempted from taxation, thereby making an unjust and unlawful discrimination against moneyed capital invested in national-bank shares, as to which no exemption or deduction is pro-

vided for by the laws of the State, which discrimination is in direct violation of the restrictions of said section 5219 of the Revised Statutes of the United States, which provides that:

"The taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State."

The correctness of so much of the act of Congress as is here set out is admitted, but the remainder of the averment is denied by the answer of the treasurer. An issue being joined on some other matters, a trial was had in the court of common pleas, and that court stated its conclusions of fact and law separately, as follows:

"First. Plaintiff is a national banking association, incorporated under and by virtue of an act of Congress, entitled 'An act to provide for the national currency, secured by pledge of United States bonds, and to provide for the circulation and redemption thereof.' Approved June 3d, 1864, and the amendments thereof, and
35 is established and doing business in the village of Wellington, county of Lorain, and State of Ohio.

"Second. The defendant is the duly elected and qualified treasurer of the county of Lorain, and State of Ohio.

"Third. The plaintiff has a capital stock of $100,000, divided into 1,000 shares of $100 each, all of which are fully paid up, and certificates for the shares are outstanding and owned by a large number of persons.

"Fourth. That in accordance with section 2765 of the Revised Statutes of Ohio, then and now in force, the cashier of plaintiff duly reported in duplicate to the auditor of said county the resources and liabilities of said banking association, at the close of business on the Wednesday next, preceding the second Monday of May, 1893, together with a full statement of the names and residences of the shareholders therein, with the number of shares held by each, and the par value thereof, as required by said section; that included in said return so made by said cashier, was the real estate owned by the plaintiff, valued at $3,420, separately assessed and charged on the tax duplicate of said county; that thereupon said auditor proceeded as required by section 2766 of the Revised Statutes of Ohio, to fix the total value of said shares according to their true value in money, and fixed the same at $74,710.00, exclusive of the assessed value of plaintiff's real estate, and made out and transmitted to the annual board of equalization of incorporated banks a copy of the report so made by said cashier, together with the valuation of such shares as was fixed by said auditor; that said State board of equalization, acting under sections 2808 and 2809 of the Revised Statutes of Ohio, did examine the return aforesaid, made by said cashier to said county auditor, and the value of such shares as fixed by said county auditor, and did equalize said shares to their true value in money, and fixed the valuation thereof at $74,710, exclusive of the assessed value of plaintiff's real estate; and the auditor of
36 said State did certify said valuation to the auditor of said county of Lorain, which said auditor of said county did enter upon the tax duplicate of said county for the year 1893.

"Fifth. That the following-named stockholders of said bank were on the said day next preceding the second Monday of April, 1893, the owners of the number of shares of stock of said bank set opposite their respective names, to wit:

S. S. Warner	150 shares.
R. A. Horr	10 shares.
W. Cushion, Jr.	50 shares.
C. W. Horr	120 shares.
O. P. Chapman	10 shares.
E. F. Webster	10 shares.
W. R. Wean	20 shares.
S. K. Laundon	120 shares.

"That said shares were valued by said State board of equalization for the year 1893, at $36,607.90, and certified by said board to the auditor of Lorain county as the taxable value of the same; that the rate of taxation for all taxes assessed and collected for the year 1893, within said county and village, was $0.0255 on the dollar's valuation, and amounted on said value of said shares to $933.50.

"Sixth. That on said day next preceding said second Monday of April, 1893, and at the time the cashier of said banking association made return to the auditor of said county of the names and residences of the shareholders of said association, with the numbers and par value of the shares of capital stock of said banking association for the year of 1893, to wit: between the first and second Mondays of May of said year, each of said above-named shareholders was indebted and owing to others of legal *bona fide* debts a sum in excess of the credits, from which under the laws of Ohio, he was entitled to deduct said debts to an amount equal to the value of said shares. That proof of said indebtedness was duly made to said auditor by the shareholders aforesaid at the time that the valuation of said shares of stock was so fixed by him, and that said auditor re-
37 fused to allow the deduction of any indebtedness of said shareholders from the value of said shares, as so fixed by said board of equalization, and the auditor of said county carried upon the duplicate delivered to the treasurer, the entire valuation of said shares so made without allowing any deductions therefrom, by reason of any *bona fide* indebtedness of said shareholders to others, from the valuation so fixed by said board of equalization.

"Seventh. That the plaintiff tendered to said treasurer of Lorain county on the 28th day of December, 1893, and offered to pay to said treasurer the sum of $485.80, if he would receive the same in full for the tax assessed upon the valuation of the shares of stock owned by the shareholders named in the petition for the entire year of 1893, and said treasurer refused to accept the same, and said treasurer intends, if not enjoined by this court, to use all lawful means for the collection of said tax so assessed upon the valuation of said shares of stock.

"And as its conclusions of law upon the above-found facts, the court find that the plaintiff is not entitled to an injunction, as

prayed for in the petition, and that said petition should be dismissed. To which conclusions of law the plaintiff excepts.

"It is therefore considered, adjudged and decreed by the court that the petition be dismissed; that the said defendant go hence without day, and that defendant recover from the plaintiff his costs herein, taxed at $—, to which judgment and decree the plaintiff excepts."

The bank filed a petition in error in the circuit court of the county, and that court upon this finding of facts reversed the judgment, and proceeding to render such judgment upon said facts as in the opinion of the circuit court the court of common pleas should have rendered, it rendered a final judgment enjoining the treasurer from collecting said taxes or any part thereof.

Thereupon the treasurer filed his petition in error in this
38 court seeking to reverse the judgment of the circuit court, and as a result having the judgment of the common pleas affirmed.

E. G. Johnson, for treasurer.

F. S. Monnett, attorney general, for the State.

Boynton & Horr, for the bank.

BURKET, *C. J.*:

Two questions arise in this case: First. Whether in the administration of our tax laws in this State, the holder of shares in a national bank has the right under the statutes, State and national, to deduct his legal *bona fide* debts from the value of such shares, and to be taxed only upon the remainder, or must he pay taxes on the assessed value of such shares without a deduction of such debts? Second. Has the defendant in error by the record in this case, shown itself entitled to enforce such deduction for its said shareholders? The determination of these questions in this case must depend pon the record, and the law properly applicable thereto.

These are Federal questions, and can only be finally and authoritatively determined by the Supreme Court of the United States. They will both be considered together.

Sections 2730 and 2737, Revised Statutes of this State, contain most of the statute law of the State bearing on the subject. They are as follows:

"SECTION 2730. In this title, the terms 'real property' and 'land' shall be held to mean and include not only land itself, whether laid out in town lots or otherwise, with all things contained therein, but also, unless otherwise specified, all buildings, structures, and improvements, and fixtures of whatever kind thereon, and all rights and privileges belonging, or in anywise appertaining thereto; the terms 'investment in bonds,' shall be held to mean and include all moneys in bonds, or certificates of indebtedness, or other evidences of indebtedness of whatever kind, whether issued by incorporated or unincorporated companies, towns, cities, villages, townships, counties, States or other incorporations, or by the United States,
39 held by persons residing in this State, whether for themselves or others; the terms 'investments in stocks,' shall be

held to mean and include all moneys invested in the capital or stock of any association, corporation, joint stock company, or other company, the capital or stock of which is or may be divided into shares, which are transferable by each owner without the consent of the other partners or stockholders, for the taxation of which no special provision is made by law, held by persons residing in this State, either for themselves or others; the terms 'personal property,' shall be held to mean and include, first, every tangible thing being the subject of ownership, whether animate or inanimate, other than money, and not forming part of any parcel of real property, as hereinbefore defined; second, the capital stock, undivided profits, and all other means not forming part of the capital stock of every company, whether incorporated or unincorporated, and every share, portion or interest in such stock, profits or means, by whatsoever name the same may be designated, inclusive of every share or portion, right or interest, either legal or equitable, in and to every ship, vessel or boat, of whatsoever name or description, used or designed to be used either exclusively or partially in navigating any of the waters within or bordering on this State, whether such ship, vessel, or boat, shall be within the jurisdiction of this State or elsewhere, and whether the same shall have been enrolled, registered, or licensed at any collector's office, or within any collection district in this State or not; third, the money loaned on pledge or mortgage of real estate, although a deed or other instrument may have been given for the same, if between the parties the same is considered as security merely the term 'money' or 'moneys' shall be held to mean and include any surplus or undivided profits held by societies for savings or banks having no capital stock, gold and silver coin, bank notes of solvent banks, in actual possession, and every deposit which the person owning, holding in trust, or having the beneficial interest therein, is entitled to withdraw, in money on demand; the term 'credits,' shall be held to mean the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or service due or to become due to the person liable to pay taxes thereon, including deposits in banks, or with persons in or out of the State, other than such as are held to be money, as hereinbefore defined, when added together (estimating every such claim or demand at its true value in money), over and above the sum of legal *bona fide* debts owing by such person; but in making up the sum of such debts owing, there shall be taken into account no obligation to any mutual insurance company, nor any unpaid subscription to the capital stock of any joint stock company, nor any subscription for any religious, scientific, literary, or charitable purpose; nor any acknowledgment of any indebtedness, unless founded on some consideration actually received, and believed at the time of making such acknowledgment to be a full consideration therefor; nor any acknowledgment made for the purpose of diminishing the amount of credits to be listed for taxation; nor any greater amount or portion of any liability as surety, than the person required to make the statement of such credits believes that such surety is in equity

bound, and will be compelled to pay, or contribute, in case there be no securities; provided, that pensions receivable from the United States shall not be held to be credits; and no person shall be required to take into account in making up the amount of credits, a greater portion of any credits than he believes will be received or can be collected, or any greater portion of any obligation given to secure the payment of rent than the amount that shall have accrued on any lease and remain unpaid; words importing the masculine gender shall apply to females also, and the word 'person' or 'party,' or other word importing the singular number, shall be held to include firms, companies, associations, and corporations; and all the words in the plural number shall apply to single individuals also, in all cases in which the spirit and intent may require."

"SECTION 2737. Such statements shall truly and distinctly set forth, first, the number of horses, and the value thereof; second, the number of neat cattle, and the value thereof; fourth, the number of sheep, and the value thereof; sixth, the number of pleasure carriages (of whatever kind), and the value thereof; seventh, the total value of all articles of personal property, not included in the preceding or succeeding classes; eighth, the number of watches, and the value thereof; ninth, the number of piano-fortes and organs, and the value thereof; tenth, the average value of the goods and merchandise, which such person is required to list as a merchant; eleventh, the value of the property which such person is required to list as a banker, broker, or stock-jobber; twelfth, the average value of the materials and manufactured articles which such person is required to list as a manufacturer; thirteenth, moneys on hand or on deposit subject to order; fourteenth, the amount of credits as hereinbefore defined; fifteenth, the amount of all moneys invested in bonds, stocks, joint stock companies, annuities, or otherwise; sixteenth, the monthly average amount or value, for the time he held or controlled the same, within the preceding year, of all moneys, credits, or other effects, within that time invested in, or converted into bonds, or other securities of the United States or of this State, not taxed, to the extent he may hold or control such bonds or securities on said day preceding the second Monday of April; and any indebtedness created in the purchase of such bonds or securities shall not be deducted from the credits under the fourteenth item of this section; but the person making such statement may exhibit to the assessor the property covered by the first nine items of this section, and allow the assessor to affix the value thereof, and in such case the oath of the person making the statement shall be in that regard only that he has fully exhibited the property covered by said nine items."

It will be noticed that national-bank shares fall within the definition of "investments in stock," and that they are what is known as "personal property." It will further be noticed that the surplus and undivided profits of saving societies, and banks having no capital stock, and money on deposit subject to withdrawal on demand, are classed as money and not as credits.

A credit is defined in short to be what is owing to a person, over and above his legal *bona fide* debts, but in making up what is owing to him he cannot include moneys, bonds, stocks, nor deposits subject to withdrawal on demand; and he cannot deduct as legal *bona fide* debts an obligation to a mutual insurance company, nor an unpaid subscription to the capital stock of a joint stock company, nor to any religious, scientific, literary or charitable purpose, nor any acknowledgment of any indebtedness unless founded on full consideration, nor an acknowledgment made for the purpose of diminishing the amount of credits to be listed for taxation, nor any greater amount as surety than he is likely to be compelled to pay, nor any indebtedness created in the purchase of non-taxable securities.

I will be noticed that there is a large class of indebtedness that cannot be deducted from the credits, and to enable the bank to fairly raise the legal question in this case it should show that the debts sought to be deducted were of the class that our statute allows to be deducted from credits, and that such deductions were generally made by others to an extent that materially affected the said shareholders financially. A mere theoretical discrimination is not sufficient, it must be actual and material.

The petition avers that a large amount of moneyed capital in the hands of individual citizens of said State and county invested in promissory notes, and other legal obligations, securities,
43 claims and demands is by allowing a deduction of legal *bona fide* debts to be made therefrom exempted from taxation, but this averment is denied in the answer, and the court does not find it to be true.

So that, for aught that appears in the findings of fact by the court, there was no deduction of debts made from credits, either in the State or county, and the only effort that was made to have such deduction so far as this record shows, was the effort on the part of these eight shareholders, and that was unsuccessful.

The petition avers that "between the first and second Mondays in May of said year, each of said above-named shareholders was indebted and owing to others, of legal *bona fide* debts, a sum in excess of the credits from which, under the laws of Ohio, he was entitled to deduct said debts to an amount equal to the value of said shares, which said excess of said debts over credits as aforesaid, the said stockholders above named were entitled to have deducted from the assessed value of said shares so severally owned by them, proof of which fact was duly made to said auditor and said State board of equalization by the shareholders at the time that they respectively fixed the valuation of said shares of stock." This averment does not say that the legal *bona fide* debts owed by said stockholders and not used as a deduction from credits in making out their tax-lists to the assessor, were not of the class which are not authorized to deduct from the credits, nor that they were of the class which are authorized to be so deducted. The averment is denied by the answer, and this put the bank upon its proof. As a

result of such proof the court finds that "between the first and second Mondays of May of said year, each of said above-named shareholders was indebted and owing to others of legal *bona fide* debts a sum in excess of the credits, from which, under the laws of Ohio, he was entitled to deduct said debts to an amount equal to the value of said shares. That proof of said indebtedness was duly made to said auditor by the shareholders aforesaid at the time that the val-
44 uation of said shares of stock was so fixed by him, and that said auditor refused to allow the deduction of any indebtedness of said shareholders from the value of said shares, as so fixed by said board of equalization."

While the court finds that there was an excess of indebtedness over credits to an amount equal to the value of said bank shares, it fails to find that such indebtedness was of the character which is authorized under the statutes of Ohio to be deducted from credits.

This court cannot presume, in the face of this record, that any deductions of debts from credits were made by individual citizens in the year of 1893, nor can it presume that the said debts of said stockholders were of the class authorized to be deducted from credits. Under our practice, the presumption is, that the court found all the facts which the proof warranted, and facts not found by the court are presumed not to exist. Jones *v.* Brown, 11 Ohio St., 606; Springer *v.* Avondale, 35 Ohio St., 624.

It is therefore clear that this record fails to bring the debts sought to be deducted within the class which is authorized to be so deducted.

It appears from said sections 2730 and 2737, that the taxable property of this State is classified as follows: That from which no deduction of debts can be made, and that from which certain legal *bona fide* debts may be deducted. The former consists of real estate, including lands, lots, buildings, structures, improvements, fixtures and privileges thereto belonging; and also personal property, such as horses, cattle, mules, asses, sheep, hogs, carriages, wagons, harness, watches, clocks, musical instruments, diamonds, jewelry, goods, merchandise, material used in manufacturing, capital employed by a banker, broker, stock-jobber, moneys on hand or on deposit subject to order, bonds, stocks, shares in joint stock companies, annuities, and all other personal property other than credits, and amounting in the whole State, as shown by the official
45 reports for the year 1893, to over one billion six hundred and thirty-six million dollars. That from which certain legal *bona fide* debts may be deducted consists of credits alone, but money on deposit subject to order cannot be counted as a credit, and the credits in the State to taxation in the year 1893, as shown by the official reports, amounted to only one hundred and six million dollars. The amount of debts deducted has not been reported, and is not officially known, but is likely to be small as compared with the credits returned.

In addition to these two classes of taxable property, we have in this State another class which is free from taxation, and which

under section 2732 Revised Statutes, consists of property real and personal, used for public schools, public colleges, public academies, public worship, cemeteries, State and United States property, county buildings, poor-houses, public charities, fire departments, markets, public grounds, public halls, soldiers' monuments, and personal property not exceeding one hundred dollars to each tax-paying individual in the State, and which exempted property amounts to over one hundred and sixty million dollars in value, as shown by the official reports.

It thus appears that credits from which certain debts may be deducted, form but a small and comparatively insignificant part of our taxable property, and are even less than our non-taxable property.

It is not the amount of credits of which the national bank shareholders complain, but of the amount of debts deducted from credits, and which deductions thereby escape taxation, and increase the taxes on such shareholders. These deductions, whose definite amount is not known, can form but a very small per centum of the total taxable property; and hence if there is any discrimination against such shareholders, it is only the same discrimination that is suffered by the holders of all kinds of property, other than credits,
46 and even by such holders of credits as owe no debits to be deducted therefrom.

Persons owning bonds issued by corporations, cities, villages, counties, States or other public bodies can have no deduction of debts therefrom. Payne *v.* Watterson, 37 Ohio. St., 121. Neither are owners of stocks, investments in stocks, or joint stock companies, entitled under the laws of this State to deduct debts therefrom. National bank shares are what are known as stocks or investments in stocks, and there is no act of Congress to the contrary, and from such stocks there can be no deduction on account of debts. Niles *v.* Shaw, 50 Ohio St., 370.

But it is said by counsel for the bank that the question is *res adjudicata*, and has been determined and settled by the Supreme Court of the United States in Whitbeck *v.* Mercantile National Bank of Cleveland, 127 U. S., 193.

The part of the syllabus on this subject is as follows:

"The statutes of Ohio regulating assessments for taxation allow an owner of moneyed capital other than shares in a national bank to have a deduction equal to his *bona fide* indebtedness made from the amount of the assessment of the value of such moneyed capital; but they make no provision for a similar deduction from the assessed value of shares in a national bank, and provide no means by which such a deduction may be obtained. Held: that the owners of such shares are entitled to have a deduction of their indebtedness made from its assessed value as in the case of other moneyed capital."

That holding was right if the statute of Ohio were as recited. But as already shown, the statutes of Ohio do not allow a deduction equal to the *bona fide* debts to be made from the amount of the as-

sessments of the value of moneyed capital in general, but only from a small and comparative insignificant amount of moneyed capital called "credits," and even from credits only a certain and
47 limited class of debts. If the court had recited in the syllabus as a predicate for its holding, the provisions of the Ohio statute as they really are, the holding would most likely have been different, and would have been as in First National Bank of Garnett *v.* Ayers, 160 U. S., 660, in which the syllabus is as follows:

"The single fact that the statutes of Kansas regulating the assessment and taxation of shares in national banks permit some debts to be deducted from some moneyed capital, but not from that which is invested in the shares of national banks, is not sufficient to show that the amount of moneyed capital in the State of Kansas from which debts may be deducted, as compared with the moneyed capital invested in shares of national banks, is so large and substantial as to amount to an illegal discrimination against national-bank shareholders, in violation of the provisions of Revised Statutes, section 5219."

No examination of the provision of the Ohio statute by the court is found in the opinion in the Whitbeck case, except as to the procedure in demanding the deduction, and even as to that there is no examination shown by the court, but the finding of the circuit court is accepted as to such provisions.

The sections of the Kansas statute under review in the Ayers case are almost identical with sections 2730 and 2737 of our own State, and it would seem that the facts being the same, the same construction should obtain as to each.

In the Whitbeck case it is assumed by the court, or at least recited in effect, that the statutes of Ohio are in substance the same as the statutes of New York, and permit a deduction of debts from the total amount of personal property, and Hills *v.* Exchange Bank, 105 U. S., 319, is cited as authority for the holding. But turning to that case, we find that the principle upon which it was decided is, that the shareholders were not allowed to deduct their debts from their shares, while other parties were allowed to deduct their
48 debts from the total amount of their personal property, and the case is founded upon Supervisors *v.* Stanley, 105 U. S., 305, decided at the same time, and in that case the statute of New York is set out, and shows that the owners of all personal property other than national-bank shares, are allowed to deduct their debts from the total amount of their personal property.

If our statute contained that provision, it would be conceded at once that the holders of national-bank shares should be accorded the same right; but they contain no such provision, and therefore it seems only proper that the question should again be presented to and considered by the Supreme Court of the United States.

That no discrimination against national banks was intended by the passage of the Ohio statutes, is conclusively shown by the fact that those statutes were passed long before national banks were created, and have remained the same in substance ever since. No

discrimination appears on the face of the statute, and that none is worked out in execution, will be shown further on.

That the main purpose of Congress in fixing limits to taxation on shares in national banks, was to render it impossible for the State to create and foster an unfriendly competition by favoring State institutions or individuals in carrying on a similar business, has been several times held by the Supreme Court of the United States, and seems now to be settled. Mercantile Bank *v.* New York, 121 U. S., 138; First National Bank of Garnett *v.* Ayers, 160 U. S., 660.

When the laws of a State tax money capital employed in national banking the same as that employed in State banks, it is held that there is no discrimination against national-bank capital, unless there is in other respects a clear discrimination in favor of money capital, other than that employed in either State or national banking. Bank *v.* Avers, 160 U. S., 60. But in this State both national and State banks are taxed under the same section, being section 2762, Revised Statutes, and in fixing the value of the shares,
49 the bank deducts its debts from its credits, so that it pays taxes only on the net valuation. Unincorporated banks are taxed in the same manner, by deducting debts from credits, so as to pay only on the net capital stock. By section 2759, in the case of incorporated State banks, after the deduction of debts from the credits are made, and the net value of each share of stock thus ascertained, the holder of such stock is compelled to pay taxes upon such value, and is not permitted to deduct his legal *bona fide* debts therefrom. In the case of unincorporated banks, when the net value of the capital is ascertained, the bank pays the taxes thereon, and the several owners of the capital are not allowed to deduct any of their debts from their share of such capital. It is thus clear that moneyed capital invested in national banks is placed upon an exact equality with moneyed capital invested in State banks, and this is all that can be reasonably asked for national banks, in the absence of a showing to the effect that moneyed capital invested in State banks is unreasonably discriminated against. That there is no discrimination against capital invested in State banks, is so clear that no argument is required to establish the fact; and that capital invested in national banks is put upon an exact equality with capital invested in State banks, is equally clear from the sections above referred to. It would therefore seem clear that there is no such discrimination against national-bank shares as to give just ground for complaint.

In the case of Davenport Bank *v.* Davenport, 123 U. S., 83, the Supreme Court of the United States in passing upon this question say in the syllabus:

"Section 5219, Revised Statutes, respecting the taxation of national banks, does not require perfect equality between State and national banks, but only that the system of taxation in a State shall not work a discrimination favorable to its own citizens and corporations, and unfavorable to holders of shares of national banks."

50 "If a State statute creating a system of taxation does not on its face discriminate against national banks, and there is neither evidence of legislative intent to make such discrimination, nor proof that the statute works an actual and material discrimination, there is no case for holding it to be unconstitutional."

In Ohio the system of taxation places State and national banks upon an exact equality without discrimination, and in the case at bar there is no proof, and no finding by the court, that the statutes work either an actual or material discrimination. It is only by giving the holder of national bank shares all the rights that a holder of State-bank shares is allowed, and then after the net value of his bank shares has been so ascertained, taking him out of the class of holder of stocks (from which no deduction of debts can be made), and changing his stock into a credit and then placing him into the class of a holder of credits (from which deduction of debts may be made), that there is even a semblance of discrimination. But this semblance is not shown to be actual, and is certainly not shown to be material, because it does not appear in this record that any others in the county or State deducted debts from credits, and there is no official report from which such fact can be ascertained.

While the official blanks of assessors require each person to give a statement of the total amount of his credits, and then the total amount of his legal *bona fide* debts, and the balance of credits over debts is carried out as the amount to be taxed, the amount of debts so deducted has not been carried into the official report, and this court has no means of knowing the amount, as no finding was made of such amount by the court of common pleas, and therefore, for the purposes of this case, the fact of such deductions does not exist.

In this case as in the Kansas case, there is an entire lack of proof on this subject, and in the absence of official records, this
51 court cannot presume that any such deductions were made, and, certainly not to an amount which would make an unlawful discrimination against national-bank shares.

To place the holder of national-bank shares into the class of bankers, and treat his shares as stocks until the net value is fixed, and then change his stock into a credit, and take him out of the class of bankers and place him into the class of private individuals, so as to enable him still further to reduce his stock thus changed into a credit, by deducting therefrom his legal *bona fide* debts, would be discriminating in favor of such national-bank shareholder, and would be giving him two chances to escape taxation, while other bankers and private individuals have but one.

Such a result was certainly not intended by the act of Congress in question.

There are about forty-six million dollars invested in national-bank shares in this State, and it is impossible to put such shares upon an exact equality with all other moneyed capital. If classed as credits, which they are not, there will be a discrimination in their favor and against other stocks, bonds and the great body of our taxable property, from which no deductions on account of debts

are allowed. If treated as stocks, which they are, under court classification, there is no discrimination against them as compared with other stocks, and bonds and the great bulk of our taxable property.

To put national-bank shares upon an equality with the most favored class of property, would free them from all taxation, as more than one hundred and forty millions in value, of public and other property, is relieved from all taxation in this State, while the whole national-bank stock amounts to only forty-six millions.

The question then is, shall national-bank shares be placed with the most favored class of property, and not be taxed at all, or shall they be classed as stocks until their net value shall be fixed, and then changed into the class of credits so as to permit
52 their holder to deduct therefrom his legal *bona fide* debts and thus be favored above the holders of other stocks, or shall they be classed as mere credits, from the face value of which legal *bona fide* debts may be deducted, or shall they be regarded and treated as stocks, which they really are, and classed with stocks and bonds and the great body of our other moneyed capital, and be taxable at their true money value without deducting the debts of the owners therefrom, as is provided for all other banks and bankers by sections 2759 and 2762 of our statutes, and by section three of article twelve of our constitution?

We think that national-bank shares belong to the class known as stocks, and not to the class known as credits, and that such shares cannot have the double advantage of both stocks and credits, and that the holders of such shares have no right under the statutes, State and national, to deduct their legal *bona fide* debts from the assessed value of such shares.

It follows that the judgment of the circuit court must be reversed, and that of the common pleas affirmed.

Judgment acordingly.

53 [Endorsed:] In the supreme court of Ohio. # 4332. H. P. Chapman, as treasurer of Lorain county, plaintiff in error, *vs.* The First National Bank of Wellington, Ohio, defendant in error. Certified transcript.

54 *Citation.*

The Supreme Court of the United States.

THE UNITED STATES OF AMERICA, *ss:*

To H. P. Chapman, as treasurer of Lorain county, Ohio, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be held at the city of Washington, District of Columbia, on the 1st day of August next, pursuant to the writ of error filed in the clerk's office of the supreme court of the State of Ohio, wherein The First National Bank of Wellington, Ohio, is plaintiff in error and you are defendant in

error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 26th day of June, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States of America the one hundred and twenty-first.

JACOB F. BURKET,
Chief Justice of the Supreme Court of Ohio.

I hereby, this 1st day of July, 1897, accept due personal service of this citation on behalf of H. P. Chapman, as treasurer of Lorain county, Ohio.

E. G. JOHNSON,
Solicitor for Appellee.

55 [Endorsed:] The First National Bank of Wellington *vs.* H. P. Chapman, treasurer. Citation.

56 In the Supreme Court of the United States.

THE FIRST NATIONAL BANK OF WELLINGTON, Ohio, Appellant,
vs.
H. P. CHAPMAN, as Treasurer of Lorain County, Ohio, Appellee.
} Prayer for Reversal.

Of October term, in the year of our Lord one thousand eight hundred and ninety-six.

Afterwards, to wit, on the first Monday of July, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said The First National Bank of Wellington, Ohio, by W. W. Boynton, its attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, that the answer of H. P. Chapman, as treasurer of Lorain county, Ohio, and the matters therein contained are not sufficient in law for the said treasurer to have or maintain his defense against the said The First National Bank of Wellington, Ohio. There is also error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid was given for the said H. P. Chapman, as treasurer of Lorain county, Ohio, whereas by the law of the land the said judgment ought to have been given for the said The First National Bank of Wellington, Ohio, and the said First National Bank of Wellington, Ohio, prays that the judgment of the supreme court of Ohio may be reversed, annulled, and altogether

held for nothing, and that it may be restored to all things which it has lost by occasion of the said judgment.

WASHINGTON W. BOYNTON,
Attorney for Appellant.

57 [Endorsed:] United States Supreme Court. First National Bank of Wellington *vs.* H. P. Chapman, treasurer. Prayer for reversal.

Endorsed on cover: Case No. 16,630. Ohio supreme court. Term No., 137. The First National Bank of Wellington, Ohio, plaintiff in error, *vs.* H. P. Chapman, as treasurer of Lorain county, Ohio. Filed July 16th, 1897.

BRIEF OF THE PLAINTIFF IN ERROR.

Filed Oct. 31, 1898.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 187.

THE FIRST NATIONAL BANK OF WELLINGTON, OHIO, PLAINTIFF IN ERROR,

vs.

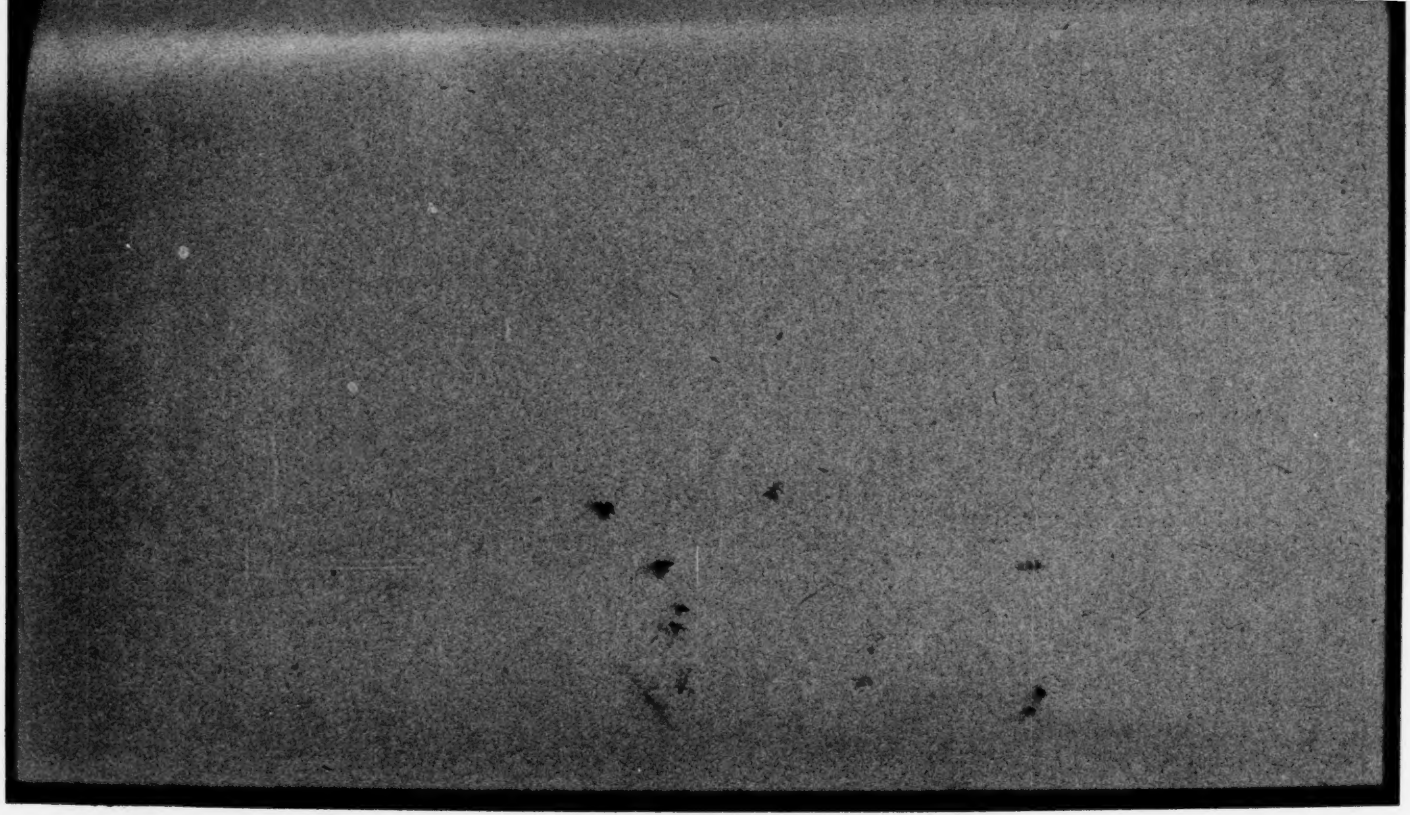
H. P. CHAPMAN, AS TREASURER OF LORAIN COUNTY, OHIO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

W. W. BOYNTON,

PLAINTIFF'S SOLICITOR.

(16,630.)



In the Supreme Court of the United States.

THE FIRST NATIONAL BANK OF WELLINGTON, OHIO,

vs.

H. P. CHAPMAN, as Treasurer of Lorain County, Ohio.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

The question to be decided in this case is whether the owner of National Bank shares in Ohio is entitled, by virtue of Section 5219 of the Revised Statutes of the United States, to deduct his legal bona fide debts from the assessed value of his shares for taxation, or to reduce their valuation for taxation to the extent of his bona fide indebtedness. The original action was brought by the plaintiffs in error, The First National Bank of Wellington, Ohio, to enjoin the defendant, Chapman, as Treasurer of Lorain County, Ohio, from collecting a tax assessed on the shares of several of its stockholders on the ground that each of said shareholders was owing on the day preceding the second Monday of April, 1893, legal bona fide debts to an amount equal to the value of the shares over and above all other credits from which under the laws of Ohio, he was entitled to make deduction of said debts. The bank alleged that under the laws of Ohio owners of personal property had the right in making out the return of their property for taxation to deduct their legal bona fide debts from their credits under Section 2730 of the Statute of Ohio which defines "credits" to mean,

"The excess of the sum of all legal claims and demands whether for money or other valuable thing, or for labor or services due, or to become due, to the person liable to pay taxes thereon, including deposits in banks or with persons in or out of this state other than such as are held to be money, as hereinbefore defined when added together, estimating every such claim or demand at its true value in money, over and above the sum of legal bona fide debts owing by such person."

It also alleged that such provision allowing such deduction of debts from credits wrought an unjust discrimination against moneyed capital invested in national bank shares, as to which no exemption was provided by the Statutes of Ohio, in violation of Section 5219 of the Revised Statutes of the United States, which in authorizing the taxation of such shares by the State, provides

"That the taxation of such shares shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state."

The Court of Common Pleas made a special finding of facts, substantially as claimed by the bank, but held that the bank shares were not credits within the meaning of the Ohio Statute, and refused to enjoin the collection of the tax thereon.

The Circuit Court on error reversed the judgment of the Court of Common Pleas, and perpetually enjoined the collection of the tax. The Supreme Court of Ohio reversed the judgment of the Circuit Court, and affirmed the judgment of the Common Pleas.

The sixth and seventh findings of the Court of Common Pleas were as follows:

"Sixth. That on the said day next preceding said second Monday of April, 1893, and at the time the cashier of said banking association made return to the auditor of said county of the names and residences of the shareholders of said association, with the numbers and par value of the shares of capital stock of said banking association for the year 1893, to-wit: between the first and second Mondays of May of said year, each of said above named shareholders *was indebted and owing to others of legal bona fide debts a sum in excess of the credits, from which under the laws of Ohio, he was entitled to deduct said debts to an amount equal to the value of said shares.* That proof of said indebtedness was duly made to said auditor by the shareholders aforesaid at the time that the valuation of said shares of stock was so fixed by him, and that said auditor refused to allow the deduction of any indebtedness of said shareholders from the value of said shares as so fixed by said board of equalization, and the auditor of said county carried upon the duplicate so made without allowing any deductions therefrom by reason of any bona fide indebtedness of said shareholders to others, from the valuation so fixed by said board of equalization.

Seventh. That the plaintiff tendered to said treasurer of Lorain county on the 28th day of December, 1893, and offered to pay to said treasurer the sum of $485.80, if he would received the same in full for the tax assessed upon the valuation of the shares of stock owned by the shareholders named in the petition for the entire year of 1893, and said treasurer refused to acccept the same, and said treasurer intends, if not enjoined by this court to use all lawful means for the collection of said tax so assessed upon the valuation of said shares of stock.

The sections of the Ohio Statute bearing on the question involved are as follows:

SEC. 2730. In this title, the terms "real property" and "land" shall be held to mean and include not only land itself, whether laid out in town lots or otherwise, with all things contained therein, but also, unless otherwise specified, all buildings, structures, and improvements, and fixtures of whatever kind thereon, and all rights and privileges belonging, or in anywise appertaining thereto; the terms "investment in bonds" shall be held to mean and include all moneys in bonds, or certificates of indebtedness, or other evidences of indebtedness of whatever kind, whether issued by incorporated or unincorporated companies, towns, cities, villages, townships, counties, states, or other incorporations, or by the United States, held by persons residing in this state, whether for themselves or others; the terms "investments in stocks," shall be held to mean and include all moneys invested in the capital or stock of any association, corporation, joint stock company, or other company, the capital or stock of which is or may be divided into shares, which are transferable by each owner without the consent of the other partners or stockholders, for the taxation of which no special provision is made by law, held by persons residing in this state, either for themselves or others; the terms "personal property," shall be held to mean and include, first, every tangible thing being the subject of ownership, whether animate or inanimate, other than money, and not forming part of any parcel or real property, as hereinbefore defined; second, the capital stock, undivided profits, and all other means not forming part of the capital stock of every company, whether incorporated or unincorporated, and every share, portion, or interest in such stock, profits, or means, by whatsoever name the same may be designated, inclusive of every share or portion, right, or interest, either legal or equitable, in and to every ship, vessel or boat, of whatever name or description, used or designed to be used either exclusively or partially in navigating any of the waters within or bordering on this State, whether such ship, vessel or boat, shall be within the jurisdiction of this State or elsewhere, and whether the same shall have been enrolled, registered, or licensed at any collector's office, or within any collection district in this state or not; third, the money loaned on pledge or mortgage of real estate, although a deed or other instrument may have been given for the same, if between the parties the same is considered as security merely; the term "money" or "moneys," shall be held to mean and include any surplus or undivided profits held by societies for savings or banks having no capital stock, gold and silver coin, bank notes of solvent banks, in actual possession, and every deposit which the person owning, holding in trust, or having the beneficial interest therein, is entitled to withdraw in money on demand; the term "credits," shall be held to mean the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or service due or to become due to the person liable to pay taxes thereon, including deposits in banks or with persons in or out of this state, other than such as are held to be money, as hereinbefore defined, when added together (estimating every such claim or demand at its true value in money), over and above the sum of legal bona fide debts owing by such person; but in making up the sum of such debts

owing, there shall be taken into account no obligation to any mutual insurance company, nor any unpaid subscription to the capital stock of any joint stock company, nor any subscription for any religious, scientific, literary, or charitable purpose; nor any aknowledgment of any indebtedness unless founded on some consideration actually received, and believed at the time of making such acknowledgment to be a full consideration therefor; nor any acknowledgment made for the purpose of diminishing the amount of credits to be listed for taxation; nor any greater amount or portion of any liability as surety, than the person required to make the statement of such credits believes that such surety is in equity bound, and will be compelled to pay, or to contribute, in case there be no securities; provided, that pensions receivable from the United States shall not be held to be credits; and no person shall be required to take into account in making up the amount of credits, a greater portion of any credits than he believes will be received or can be collected, or any greater portion of any obligation given to secure the payment of rent than the amount that shall have accrued on any lease and remain unpaid; words importing the masculine gender shall apply to females also, and the word "person" or "party," or other word importing the singular number, shall be held to include firms, companies, associations, and corporations: and all words in the plural number shall apply to single individuals also in all cases in which the spirit and intent may require it.

SEC. 2746. Personal property of every description, moneys and credits, investments in bonds, stocks, joint stock companies, or otherwise, shall be listed in the name of the person who was the owner thereof on the day preceding the second Monday of April, in each year; but no person shall be required to list for taxation any share or shares of the capital stock of any company, the capital stock of which is taxed in the name of such company.

SEC. 2737. Such statement shall truly and distinctly set forth, first, the number of horses, and the value thereof; second; the number of neat cattle, and the value thereof; third, the number of mules and and asses, and the value thereof; fourth, the number of sheep, and the value thereof; fifth, the number of hogs, and the value thereof; sixth, the number of pleasure carriages (of whatever kind), and the value thereof; seventh, the total value of all articles of personal property, not included in the preceding or succeeding classes; eighth, the number of watches, and the value thereof; ninth, the nnmber of piano fortes and organs, and the value thereof; tenth, the average value of the goods and merchandise, which such person is required to list as a merchant; eleventh, the value of the property which such person is required to list as a banker, broker, or stockjobber; twelvth, the average value of the materials and manufactured articles, which such person is required to list as a manufacturer; thirteenth, moneys on hand or on deposit subject to order; fourteenth, the amount of credits as hereinbefore defined; fifteenth, the amount of all moneys invested in bonds, stocks, joint stock companies, annuities, or otherwise; sixteenth, the monthly average amount or value, for the time he held or controlled the same, within the preceding year of all moneys, credits, or other effects, within that time invested in, or converted into bonds or other

securities of the United States or of this state, not taxed, to the extent he may hold or control such bonds or securities on said day preceding the second Monday of April; and any indebtedness created in the purchase of such bonds or securities shall not be deducted from the credits under the fourteenth item of this section; but the person making such statements may exhibit to the assessor the property covered by the first nine items of this section, and allow the assessor to affix the value thereof, and in such case the oath of the person making the statement shall be in that regard only that he has fully exhibited the property covered by said nine items.

I.

ARGUMENT.

It will be noticed that the taxable property of Ohio is primarily classified by Section 2730 above cited, into real estate and personal property, personal property being further divided and classified into tangible things animate or inanimate, "investmens in bonds," "investments in stocks," "money or moneys," and "credits."

It will be further noticed that all intangible property, or legal claims and demands of every conceivable kind, are defined to be "credits," except investments in bonds of the classes described in Section 2730, some of which are non-taxable, and investments in stocks, and that investments in bonds of the classes defined by the section, are the only choses in action, or legal claims, and demands that are not denominated credits.

All conceivable moneyed obligations, except government, municipal and company bonds, are credits from which *bona fide* debts of the owner are deducted in fixing their value for taxation.

The question, therefore, before the Court, a question heretofore carefully considered by this Court and its judgment given thereon in *Whitbeck* vs. *The Mercantile National Bank, of Cleveland*, 127 U. S. 193, on the precise state of facts here existing, is, do credits in Ohio constitute relatively such a material portion of the moneyed investments or capital in the hands of individual citizens of the state, as to cause by their exemption from taxation, without a like exemption of National Bank shares, a violation of the restriction above recited from Section 5219 of the Revised Statutes of the United States; such section authorizing the taxation of National Bank shares by the State, but not at a greater rate than that imposed on other moneyed capital in the hands of individual citizens of the State. It will be our purpose to show, after reviewing the decision of the Supreme Court of Ohio, that the moneyed capital invested in credits in Ohio actually reported for taxation and irrespective of a vast amount from which debts are actually taken, is more than double that of all other kinds of moneyed capital as that term has been defined by this Court; and that the same

exceeds in amount all other moneyed investments in the State added to all its money returned for taxation. Before this, however, we invite the attention of the Court to an analysis of the decision of the Supreme Court of Ohio.

REVIEW OF THE DECISION OF THE SUPREME COURT OF OHIO.

The proposition announced by the Supreme Court of Ohio in deciding the case below, reversing the judgment of the State Circuit Court, as stated in the syllabus of the case is as follows:

"In the administration of our tax laws, the holder of National Bank shares has no right under the statutes, State and National, to deduct his legal bona fide debts from the value of such shares, but he is legally bound to pay taxes upon the assessed value of such shares without deduction on account of such debts." (56 O.S., 310, Record p. 19.) This holding covered and was intended to cover the entire question of the right to deduction of debts from the value of National Bank shares, and to plant the Court squarely against this Court's judgment in *Whitbeck* vs. *The Mercantile National Bank*, *supra*, which gave construction to the same statutes; and also against the judgment of this Court in other cases involving the same legal question. The judgment of the Supreme Court of Ohio not only antagonizes a carefully considered judgment of this Court in which all its members concurred given on legislation unchanged in any particular, and on a question exclusively federal in its nature, but the Court by this decision reverses itself.

In *Miller, treasurer*, vs. *First National Bank*, 46 O. S. 430, the court say:

"Unless the shares are assessed for taxation in the names of the shareholders, there would be no opportunity given a shareholder to have a deduction in his favor for any *bona fide* indebtedness on his part; and to which he would be entitled under the decisions in *Whitbeck, treasurer*, vs. *Mercantile National Bank*, 127 U. S. 193-199; *Hills* vs. *Exchange Bank*, 105 U. S. 319; *Supervisors* vs. *Stanley, Id.*, 305."

After reciting the state statutes defining the various classes of property both real and personal, the Court in its opinion, (record, page 25,) says:

"A credit is defined in short to be what is owing to a person over and above his legal *bona fide* debts, but in making up what is owing to him he cannot include moneys, bonds, stocks, or deposits subject to withdrawal on demand, and he cannot deduct his legal *bona fide* debts and obligations to a mutual insurance company, nor an unpaid

subscription to the capital stock of a joint company, nor to any religious, scientific, literary or charitable purpose, nor any acknowledgment of any indebtedness, unless founded on full consideration, nor an acknowledgment made for the purpose of diminishing the amount of credits to be listed for taxation, nor any greater amount as surety that he is likely to be compelled to pay, nor any indebtedness created in the purchase of non-taxable securities. It will be noticed that there is a large class of indebtedness that cannot be deducted from the credits and to fairly enable the bank to raise that question in this case, it should show that the debts sought to be deducted, were of the class that our Statute allows to be deducted from credits, *and that such deductions were generally made by others to an extent that materially affected the said share-holders financially.*"

Here the Court say two things are required to enable the bank fairly "to raise the legal question," when they obviously mean that the bank must establish two facts in order to obtain judgment; the two facts being, that the debtswere of a kind that did not include obligations to any mutual insurance company, nor an unpaid subscription to the capital stock of a joint stock company; nor to any religious, scientific, literary or charitable purpose and the like. And, secondly, that the bank must show that the deductions were allowed to others by the statute, and that such allowed deductions were *actually made* to an extent that materially affected the bank shareholders financially. As to the first of these propositions, the finding of the trial court (record page 10), is that on the day fixed by the statute as the one determining the property to be listed, and on which a lien attaches to real estate for the taxes levied thereon for that year.

"Each of said above named shareholders was indebted and owing to others of *legal bona fide debts* a sum in excess of the credits from which under the laws of Ohio, he was entitled to deduct *said debts* to an amount equal to the value of said shares; that proof of *said indebtedness* was duly made to said auditor by the shareholders aforesaid at the time that the valuation of said shares was so fixed by him, and that the auditor refused to allow the deduction *of any indebtedness of said shareholders from the value of said shares.*"

This finding followed the language of the statute, and was understood by counsel on both sides to be sufficiently definite to raise the question of the right to the deduction. But, we submit, that it is in technical compliance with the statute when the statute is carefully examined and its true meaning ascertained. The statute does not say that legal bona fide debts, less debts to a mutual insurance company, and debts arising out of subscriptions for religious and charitable purposes and the like, may be deducted from credits. It says that legal bona fide debts *may be deducted*; but that *in making up the sum*

of the legal bona fide debts to be deducted, debts created by charitable subscriptions and other similar indebtedness, must be excluded. When the trial court found that the shareholders were indebted and owing to others of *legal bona fide debts* a sum in excess of their credits, from which, *under the laws* of Ohio, he was entitled to deduct said debts to an amount equal to the value of said shares, and that proof of said indebtedness was duly made to the auditor, it is perfectly obvious that it meant the class of debts which the statute permitted to be taken from credits, in other words, legal bona fide debts from which had been excluded such particular obligations as were by the statute required to be excluded. And such was the interpretation of the Attorney General who argued the case in the Supreme Court of Ohio. In his brief in that court, p. 35, he said—"Section 2730 defines credits to mean "the excess of the sum of all legal claims and demands, whether money or other things of value, over and above the sum of legal bona fide debts owing to such person." Under the statute, legal bona fide debts, *ex vi termini*, mean the debts made up as the statute requires legal bona fide debts to be made up, as credits are declared to be the *excess* of legal claims and demands over debts *so made up*. In using that term in the finding, it was employed in the same sense as used by the Supreme Court of Ohio in *Treasurer* vs. *Bank*, 47 O. S., 522. There commenting on the definition of credits made by the Statute, and of the right of an unincorporated bank to the deduction, it said:

"Acquiescing in the meaning of the term as thus settled by statute, the amount of the credits of the defendant to be placed on the duplicate for taxation, will be the excess of all its legal claims and demands over and above its *bona fide debts;* in other words, its credits will be estimated by deducting *such* debts from its legal claims and demands."

Here no other characterization is given to the debts which the statute authorizes to be deducted from credits than the term "legal bona fide debts." Within the meaning of the statute, charitable obligations and the like are not legal bona fide debts.

Such was the meaning given to the finding by counsel for the Treasurer as well as by counsel for the bank, and such was the meaning of the Court finding the fact. The point that the finding did not more specifically define the debts embraced with the term, "legal bona fide debts" was not taken by counsel at any time or in either Court. It was throughout treated as a finding of the existence of the statutory indebtedness authorized to be deducted from credits. The objection of insufficiency in the finding was first brought to notice in the opinion of the Supreme Court of Ohio.

In view of this fact, we believe we are justified in bringing to the attention of the Court here, what opposing counsel conducting the

trial of the case in the Common Pleas Court will readily admit to be true, that at the trial, when proof was being offered of the specific indebtedness of each of the shareholders evidenced by promissory notes given for money borrowed, its progress was stopped by the admission in open court by counsel for the treasurer of the fact of the indebtedness, he stating his reliance to be on the fact that the bank shares were not credits. The case then proceeded with the argument of the legal question. The finding as drafted, was intended and supposed to meet the requirement of the statute, and so treated throughout, and we submit should be so regarded here.

The second proposition above stated, as a predicate for the conclusion reached, that it was the duty of the bank to show that persons authorized to make deductions of debts from credits exercised the right to such extent as to materially affect the shareholders of the bank financially, we most respectfully deny. The entire reasoning of the Court on this point proceeds upon the false assumption, that if, in a given year there happens to be no credits from which deductions can be made, or no debts to be taken from credits, in the particular community where the bank is located; or if persons entitled to make deductions refrain from so doing, then the debts of the shareholder cannot for that year be deducted from the value of the shares, although the statute allows the same where both credits and debts in fact exist, and the right to deduct is exercised. The right of one citizen is made to depend on the exercise of a similar right by another. That we do not misapprehend, and therefore misinterpret the Court's meaning, or that the statement was not a mere slip of the pen, we quote a further passage from the opinion. It is said: (record p. 26).

"The Court cannot presume in the face of this record that any deductions of debts from credits were made by individual citizens in the year 1893."

And at page 25:

"The petition avers that a large amount of moneyed capital in the hands of individual citizens of said State and County invested in promissory notes and other legal obligations, securities, claims and demands, is by allowing deduction of legal bona fide debts to be made therefrom exempted from taxation. But this averment is denied in the answer, and the Court does not find it to be true. So that for aught that appears in the finding of facts by the Court, *there was no deduction of debts made from credits either in the state or county*, and the only effort that was made to have such deduction so far as this record shows, was the effort on the part of these eight shareholders, and that was successful."

We remark in passing, that we did not suppose that a statement in the petition that a large amount of moneyed capital in the hands

of individual citizens of the state invested in promissory notes and other legal obligations, securities, claims and demands, was exempt from taxation by the allowance of the deduction of legal bona fide debts therefrom, would be seriously considered as stating a fact requiring any proof for its establishment other than a simple reading of the statute. That it is only the statement of a legal conclusion from the Ohio Statutes, which might well have been omitted, is perfectly obvious. Yet because of the failure of the trial Court to find the averment to be true from proof disclosed by evidence given at the trial, the conclusion is reached that there were no actual deductions of debts from credits, either in the county or state. The Court in effect denies that the laws of Ohio allow a deduction of bona fide debts from moneyed capital invested in promissory notes, and "other legal obligations, securities, claims and demands," unless an unnecessary averment of the fact is proved by evidence adduced at the trial, when the only way to prove the fact would be to put the statute in evidence, a mode of proof clearly in admissible, as the Court takes judicial notice of what the statute contains.

The question, however, is, to what extent *do the laws of Ohio permit or allow exemption* from taxation of moneyed capital in the hands of individual citizens of the state through deduction of debts from credits otherwise taxed. It is not of the slightest consequence whether the right of deduction be exercised or not. The right of one citizen cannot be made to depend on the assertion of, or failure to assert, a like right by another. The act of Congress says to the State, you may tax bank shares to the same extent that your legislation *requires* the taxation of the moneyed capital of individuals. To the extent that moneyed capital is relieved from taxation, to the same extent shall national bank shares be relieved. This is the plain and obvious meaning of Section 5219 of the Revised Statutes of the United States. Were the position of the court below at all tenable, the result would be that bank shareholders could deduct their debts from the value of their shares in localities where debts are in fact taken from credits by individuals, while in other communities having no debts, or credits, in the particular year, bank shareholders would be denied the privilege. The absurdity of this position is so apparent from its mere statement, that no argument can make it more obvious. If, however, it were at all necessary that deductions appear, of such fact, courts take judicial notice. In the varied and manifold business enterprises carried on in a commercial and manufacturing state, that money is borrowed in large amounts with which to carry them forward, is a fact within the knowledge of all intelligent men, and a fact of such character that its existence is to be at once assumed as a matter of common knowledge. The Supreme Court of Indiana, in a case involving the question

whether a material portion of moneyed capital of the state was invested in credits, after enumerating a large number of contracts which were credits, within the meaning of the Statute, of that state, called "second division," said:

"To hold in the case before us that it was necessary to aver and prove that the above second division of the moneyed capital constitutes a large and material part of the whole moneyed capital of the State, would be to hold that the Court cannot know what must be known to the mass of the people, and what any intelligent person would be reluctant if not ashamed to confess he does not know." *Wasson, Treasurer*, vs. *The First National Bank of Indianapolis*, 107 Ind., 221.

This language is quite as applicable to the question whether debts are actually taken from credits in the assessment of the latter for taxation. That deductions are actually made in large volume is a matter of common knowledge among all business men. The holding of the Supreme Court of Indiana, that such credits constituted a large part of the moneyed capital of the state, was said of a class of credits, all of which and many more exist in Ohio.

See in re Duncan 139 U.S. 457
+ Jones v. No. S. 137 U.S. 216

II.

Again, the Supreme Court of Ohio, instead of comparing the taxable credits of 1893, as shown by the official report of the State Auditor with that of other moneyed capital, or with intangible property of any kind shown by the same report, in order to ascertain whether a material portion of moneyed capital was exempt from taxation by the process of deducting debts from credits, made its comparison, drawing its information from the same report, with all the taxable property in the state *both real* and *personal*. At page 26 of the Record, the Court says:

"It appears from Sections 2730 and 2737, that the taxable property of the state is classified as follows: That from which no deductions can be made, and that from which certain legal bona fide debts may be deducted. The former consists of real estate * * * * * * * * * and also some personal property, such as horses, cattle, etc. * * * * * * capital employed by a banker, stock broker, money on hand or on deposit, subject to order, bonds, stocks, etc. and other personal property other than credits, and amounting in the whole state as shown by the official record for the year 1893, to $1.636,000,000. That from which bona fide debts may be deducted consists of credits alone, but money on deposit subject to order cannot be counted as credit, and credits in the state subject to taxation in the year 1893 as shown by the official records, amounted to $106,000,000.

The Court then proceeds to enumerate the property that is free from taxation, such as school-houses, colleges, academies, Churches, property belonging to the State and the United States, County buildings, poor houses, &c., and then closes the discussion of the point by saying:

"It thus appears that credits from which certain debts may be deducted form but a small and comparatively insignificant part *of our taxable property*."

That is to say, $106,000,000 is but a small and comparatively insignificant part of the *grand duplicate valuation* of real and personal property amounting to $1,636,000,000. Although having before it the exact information of the value of all personal property, including credits, and other moneyed capital returned for taxation, found in the same official report referred to for the ascertainment of the value of all taxable property, the Court makes not the slightest allusion to the amount, or value, of personal property returned, and noticeably none of the "moneyed capital" returned with which alone the comparison should be made. From the same report it appears that $1,174,520,000 of the grand duplicate valuation was for realty, and $568,567,255 for personalty of every kind, tangible and intangible; and of this sum, all except $165,928,748 was for tangible and other personal property, not moneyed capital; and of the $165,928,748, $111,173,728 were credits, while only $9,676,374 were invested "in bonds, stocks joint stock companies, annuities or otherwise." In other words, this latter sum of $9,676,374, was all of the moneyed investments of the State outside of credits and investments in bank capital. We shall make this clear by a tabular statement from the official report on page 33 of this brief. If it be true, as stated by the learned judge delivering the opinion of the Supreme Court of Ohio, that $106,000,000—a misstatement of the aggregate amount of credits of 1893, as will hereinafter more particularly appear—is an insignificant part of $1,636,000,000, the question of discrimination between the $106,000,000 and the other "moneyed capital in the hands of individual citizens of the state," would have been much more enlightened by the comparison of the $106,000,000 with the $54,755,020, which was for that year the total amount of all moneyed capital in the hands of individual citizens of the state, exclusive of credits, but inclusive of all investments in bank shares.

The Court's reasoning leads to but one conclusion, and that is, if it established the fact that under the entire tax legislation of the state relating to both realty and personalty, and personalty of every kind, no injustice was done to National Bank shares, then, and in such case, the act of Congress was not violated, no matter what might be the particular relation, as to value, between credits, under the Ohio Statute, and other moneyed capital in the hands of individual citizens of the state.

We were not only subjected to this false comparison by the Court on the question of discrimination, but we were denied the right to avail ourselves of the presumption that there were any credits in Ohio in the year 1893 in excess of the alleged $106,000,000 from which deduction of debts was actually made. The Court at page 30 of the Record, in speaking of debts actually deducted in the state, says:

"The amount of debts so deducted has not been carried into the official record, and this Court has no means of knowing the amount as no finding was made of such amount by the Court of Common Pleas, and, therefore, for the purposes of the case, *the fact of such deduction does not exist.*"

In view of the legislation of the state this conclusion is somewhat remarkable. There is no requirement of the statute that the amount of debts deducted from the "legal claims and demands" of the owner shall be stated or exhibited. No report of the same is required. No method is prescribed for the ascertainment of the debts so deducted. Credits, after deductions are made, are returned for taxation. They are "the excess of all legal claims and demands over legal bona fide debts." The owner makes his own deduction and return, hence, there could be no official report on the subject. The bank had no possible means of knowing the amount of such debts, outside of bank loans and discounts, and could have offered no proof on the subject. No proof was available, except to call all the tax payers of Ohio as witnesses and prove by them the aggregate amount of debts taken from credits, yet the Court tells us because we did not make this proof, and secure a finding of the fact, that presumably there were no such deductions, and consequently no credits in the state, not actually returned. Refusing to take notice judicially of a fact incapable of proof, but which, all experience and observation declare to exist; refusing to recognize a presumption that unincorporated banks deduct their bills and accounts payable from their bills and accounts receivable although the statute expressly authorizes them to do so; that merchants and manufacturers, and private individuals carrying on vast business operations throughout the state, and necessarily requiring large credit, on the day preceding the second Monday of April in the year 1893, had any debts to deduct from their credits, or credits from which to make such deduction of debts. The Court shut its eyes to the most obvious of commercial facts. That the credits returned in Ohio during any year are but a small portion of the credits existing, is a fact of common knowledge among business men and one of which the Court should have taken judicial notice. Moreover, an examination of Volume 1, of the report of the Controller of the Currency to Congress in the year in which the Court announced its opinion (p. 656), exhibits the fact that National Banks in Ohio held $118,820,137 of loans and discounts all of which were credits under the

Ohio Statute; and the report of the Auditor of State actually examined by the Court to ascertain the credits returned and taxed for the year 1893. Page 318, *et. seq.* shows $50,000,000 of loans and discounts by state banks, all of which were credits, making a total of $168,820,137, in banks alone. From this source alone the Court had the means of knowing that a large amount of credits existed in Ohio over and above those actually returned for taxation, and must have been in fact deducted from debts under the statutory privilege so to do.

III.

Again, the court fell into a vital error, and placed itself into direct and sharp antagonism to this court, in holding that all the national banks had the right to ask under the act of Congress, is, that they be placed, as regards taxation, on an equality with State banks. This holding is at war not only with the act of Congress, but with repeated decisions of this Court. At page 29 of the opinion, the Court say,

"In this state both national and state banks are taxed under the same section, being section 2762, Revised Statutes, and in fixing the value of the shares, the bank deducts its debts from its credits, so that it pays taxes only on the net valuation. Unincorporated banks are taxed, in the same manner (?) by deducting debts from credits, so as to pay only on the net capital stock. By Section 2759 in the case of incorporated state banks after the deduction of debts from the credits are made, and the net value of each share of stock thus ascertained, the holder of such stock is compelled to pay taxes upon such value, and is not permitted to deduct his legal bona fide debts therefrom. In the case of unincorporated banks when the net value of the capital is ascertained, the bank pays the taxes thereon, and the several owners of the capital stock are not allowed to deduct any of their debts from their share of such capital. It is thus clear that moneyed capital invested in national banks is placed upon an exact equality with moneyed capital invested in state banks, and this is all that can be reasonably asked for national banks, in the absence of a showing to the effect that moneyed capital invested in state banks is unreasonably discriminated against. That there is no discrimination against capital invested in state banks, is so clear that no argument is required to establish the fact; and that capital invested in national banks is put upon an exact equality with capital invested in state banks is equally clear from the sections above referred to. It would therefore seem clear that there is no such discrimination against national bank shares as to give just ground for complaint."

As will be presently shown, it would be difficult to put into fewer words so many inaccurate statements of what sections 2762 and 2759 of the Ohio Statute provide.

We challenge the accuracy of this statement, in every feature of it, in what it says of the Ohio Statutes, and in its holding that the

shareholders of the plaintiff bank have no right to complain of a violation of rights secured to them by the act of Congress if no discrimination is made between national and state banks in the valuation of their shares for taxation.

We elsewhere refer to the decisions of this court that are expressly to the contrary of this mode of comparing valuations, as the test of discrimination.

We, however, notice in passing that under the original act, authorizing the organization of national banking associations, passed February 25th, 1863, (12 statutes at large, 668,) the state derived no authority to tax the shares of such banks. Power was first granted by the 41st Section of the act of 1864, (13 U. S. Statutes at large, p. 111.)

That act authorized the taxation of bank shares under three restrictions:

First.—Not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the state.

Second.—That the tax so imposed under the laws of any state upon the shares of any of the associations authorized by the act, *should not exceed the rate imposed upon the shares of any of the banks organized under state authority.*

Third. Limiting the taxation of real estate owned by the bank to the same valuation as that fixed upon other real estate in the state where the bank was located.

By the amended act of 1868, the second of the above restrictions, namely: limiting the rate to that imposed upon the shares of banks organized under state authority, was omitted, leaving the statute in its present form, and therefore eliminating from the consideration of the question all comparison with the taxation upon shares of state banks, except as they were to be treated under the first restriction as moneyed capital in the hands of individual citizens of the state. This amendment shows very clearly the intention of Congress not to make the valuation of capital in state bank shares, the measure of the valuation of the shares of National Banks. If it had so intended it would have repealed the first limitation or restriction above recited, and permitted the second to stand. In the first place, the Court fell into a grave error in stating that under Section 2762 of the Revised Statutes of Ohio, which we recite below, and which relates only to incorporated banks, the state banks deduct their debts from their credits That section makes no reference to the matter of deduction and confers no such right. There is not a word in the section that justifies the statement. It also fell into a like error in supposing that Section 2759 has any reference whatever to incorporated banks. It relates wholly, as its terms show, to unincorporated banks and bankers.

It reads: "All unincorporated banks and bankers shall annually, between the first and second Mondays in May, make out and return to the Auditor of the proper county under the oath of the owner or principal officer or manager thereof, a statement setting forth:

"First. The average amount of notes and bills receivable, discounted, or purchased, in the course of business by such unincorporated bank, banker or bankers, and considered good and collectible.

Second. The average amount of accounts receivable.

Third. The average amount of cash and cash items in possession or in transit.

Fourth. The average amount of all kinds of stocks, and bonds including United States Government bonds, or evidences of indebtednesses held as an investment, or in any way representing assets.

Fifth. The amount of real estate at its assessed value.

Sixth. The average amount of all deposits.

Seventh. The average amount of accounts payable exclusive of current deposit accounts.

Eighth. The average amount of United States Government and other securities that are exempt from taxation.

Ninth. The true value in money of all furniture and other property not otherwise therein enumerated. From the aggregate sum of the first five items above enumerated, the said Auditor shall deduct the aggregate sum of the fifth, sixth, seventh and such portions of the eighth item as are by law exempt from taxation, and the remainder thus obtained added to the amount of Item 9 shall be entered on the duplicate of the county in the name of such bank, banker or bankers, and taxes thereon shall be assessed and paid the same as provided for other personal property assessed and taxed in the same city, ward or township."

This is the entire section. It makes not the slightest allusion to incorporated banks, and the Court was grossly mistaken in stating that it permitted deduction of debts from credits in that class of banks. It is quite true that State banks that are incorporated are taxed under the laws of Ohio as national banks are, but the capital invested in incorporated state banks is a very small amount when compared with the capital of national banks doing business in the state; and especially so, when compared with the credits actually returned for taxation, to say nothing of the vast amount from which deductions are actually made and of which no return is made. In *People* vs. *Weaver*, 100 U. S., 543, Mr. Justice Miller, speaking of the State of New York, said that "Nearly all banks in that state *and in all others*, are national banks."

Unincorporated banks and bankers are authorized by Section 2759 of the Ohio Statutes, *supra*, to deduct their debts from all legal claims and demands of every kind, including investments in bonds. They are also authorized to deduct their debts from investments in stocks of all kinds. The section requires by sub-division 4, the statement of the bank to the auditor to contain the average amount of all kinds of stocks and bonds, including United States Government bonds, or evidences of indebtedness held as an investment, or in any way representing assets. By the 9th sub-division of the section the auditor is required to deduct the debts of the bank from the amount invested in stocks and bonds, and other evidence of indebtedness, held as an investment, as well as to deduct the debts from bills and accounts receivable. By this section the debts of the bank are taken from the moneyed investments of every kind, a right withheld from incorporated state banks, as well as from national banks, thereby creating a discrimination in favor of private banks in direct violation of the principle of uniformity and equality of taxation prescribed by the Constitution of Ohio, and in further direct violation of Section 5219 of the Revised Statutes of the United States, and of the provision of the 14th amendment of the constitution of the United States, securing to the citizen the equal protection of the laws.

The taxable valuation in Ohio of the shares of incorporated state banks in 1893 was $6,462,613. The value of shares of national banks in the same year, was $37,506,418. The state bank shares being a little over one sixth in value of the shares of national banks, the valuation of the former is so small a percentage of the valuation of the latter as to make a comparison between the two classes of shareholders unjust to the shareholders of national banks, if no other moneyed capital was taken into account in determining whether the restriction provided by the act of Congress had been violated or not. Nor is it true, as stated by the State Supreme Court, that unincorporated banks, by the laws of Ohio, pay on the same valuation as national banks. This was a vital error, materially affecting the judgment of the Court. They pay on an entirely different valuation, one clearly discriminating against national banks. Unincorporated state banks are expressly authorized to deduct their bills and accounts payable from their bills and accounts receivable. Or, in other words their legal bona fide debts from their credits. The reading of Section 2759 above recited not only shows this to be true, but it was so held by the Supreme Court of Ohio in *Treasurer* vs. *Bank*, 47 O. S., 522. As respects incorporated banks, both national and state, the mode of valuation is entirely different from the valuation of the moneyed capital invested in unincorporated banks. Section 2762, above alluded to, and under which the Court mistakenly said "the bank deducts its debts from its credits," reads as follows:

"All shares of the stockholders in incorporated banks or banking associations located in this state whether now or hereafter incorporated or organized under the laws of this state or of the United States, shall be listed *at their true value in money*, and taxed in the city, or village where such bank is located and not elsewhere."

Section 2765 provides that,

"The cashier of each incorporated bank shall make out and return to the auditor of the county in which it is located, between the first and second Mondays of May annually a report in duplicate under oath exhibiting in detail and under appropriate headings *the resources and liabilities* of such bank at the close of business on the Wednesday next preceding said second Monday, together with a full statement of the names and residences of the stockholders therein, with the number of shares held by each and the par value of each share."

Section 2766 provides:

"Upon receiving such report the county auditor shall fix the total value of the shares of such banks *according to their true value in money*, deducting from the aggregate sum so found the value of the real estate included in the statement of resources as the same stands on the duplicate, and thereupon he shall make out and transmit to the State Board of Equalization for incorporated banks, a copy of the report so made

by the cashier, together with the valuation of such shares as so fixed by said auditor."

These sections require the shares to be assessed by the Auditor at their true value in money, without specifically directing how that value is to be ascertained. The bank makes no deduction of debts from credits. It is not authorized to fix any value. It simply makes return of its resources and liabilities, with the names and place of residence of the shareholders. The entire value is made up by the Auditor, and later equalized by the State Board of Equalization for banks to their *true value in money*, section 2809. The true value in money is to be ascertained with no provision for deduction as in unincorporated banks. Generally speaking, three things enter into the value of shares in all corporate bodies organized for profit: capital, surplus and franchise. Capital, surplus and the goodwill of the business make up the value of the shares. *Adams Express Co.* vs. *Ohio*, 166 U. S. 185. The value of the goodwill in banking is largely measured, and materially affected, by the amount of deposits. In so far, therefore, as the goodwill of the banking business enters into the value of national bank shares returned for taxation, there is a palpable and material discrimination between such value and the value fixed upon moneyed capital employed in private banking. No element of goodwill enters into the valuation of the latter. So, it is not true as the court below stated, that moneyed capital invested in national banks is placed upon an exact equality with money invested in state banks. Inasmuch as unincorporated banks are expressly authorized to deduct their debts from their credits in the valuation of the latter for taxation, which right of deduction is denied to incorporated banks, and inasmuch as every man in the state is authorized to enter into this kind of banking and possess himself of this privilege of exemption and thereby bring himself directly into sharp competition with national banks in carrying on his banking business, a marked discrimination against national bank shares results.

It matters not that at the present time an equal amount of money may not be employed in private banking. The laws of Ohio authorize any amount of capital to be invested therein. The fact of discrimination cannot be made to depend on whether in a given year more or less capital is employed in the banking business, the question always being what do the laws of Ohio allow. The taxation as authorized must not result in discrimination, and discrimination results when elements of value are excluded from the assessment in one class that are included in the other.

But if it were true that all state banks are placed on an exact equality with national banks, the conclusion reached by the Court, that consequently there is no discrimination made by the laws of Ohio

against national bank shares in favor of other moneyed capital, by no means follows. This was so declared by this Court in *Whitbeck* vs. *Mercantile Bank*, *supra*, with the whole legislation of Ohio on the subject before it. The fact appeared in that case, as clearly appears from the opinion, that banks incorporated and doing business under the laws of the state, and national banks, have their shares valued by the same rule. It was held, however, that this did not obviate the objection of discrimination. The question still remained whether outside of banking capital there was a discrimination between the valuation of national bank shares for taxation and other moneyed capital in the hands of individual citizens of the State. This clearly appears from the opinion of Mr. Justice Miller, a portion of which we give below. The certificate of division under which the Court received the case contained among other facts found the following:

1st. That moneyed capital other than that invested in shares of national banks in the hands of individual citizens of the City of Cleveland, and County of Cuyahoga, in which the complainant bank is located, was by the rule of valuation fixed by the taxing officers of said county and city valued for taxation in the year 1885 at 60% only of its true value in money.

2nd. That the auditor of Cuyahoga County in accordance with the provisions of Section 2766 of the Revised Statutes of Ohio, fixed *the total value of the shares of incorporated banks* at 60% of their true value in money in accordance with said rule.

Third. That the auditor of said county for the year 1885 in accordance with the rule and practice thereunder adopted for the valuation of other moneyed capital in the hands of individual citizens of the state and county aforesaid, fixed the value of the shares of said banks for said year at 60% of its true value in money and certified and transmitted the same to the annual state board of equalization for incorporated banks.

Fourth. That the Board of Equalization increased the value of the shares of complainant from 60% of their true value in money to 65% of their true value in money which latter value was certified to the auditor of Cuyahoga County, and by him placed upon the duplicate for said year and said duplicate was sent to the defendant, the treasurer of said county, for collection of the taxes thereon. That in the year 1885 the total value of the levy for all purposes in said county and city was twenty-six mills on the dollar valuation; twenty-three mills and six-tenths of which were deducted for county and state purposes and two mills and four-tenths state levy for such purposes. The same percentage of actual value was fixed by the county auditor ond by the state Board of equalization for incorporated banks upon the shares of incorporated banks of the state *both state and national.*"

Here was an express finding that national and state banks were treated alike in the valuation of their shares.

In answer to the claim that the state Board of Equalization for incorporated banks made a just estimate of the value of the shares throughout the state, Mr. Justice Miller, at page 105, says:

"It is probably the fact as alleged by the counsel for the treasurer that the state board having these stocks under consideration may have made a truer estimate and may have equalized their assessed value over the entire state, but this equalization from the very nature of the functions and powers of that body merely has reference to bank shares themselves; that is to say, its purpose is to make the capital stock of *all incorporated banks* in the state *equal in valuation*, for the purposes of taxation so far as relates to their actual cash value. This board has no other power than this. *It has no capacity to equalize the valuation of bank shares for taxation as compared with other moneyed capital in the state.* Such capital may, therefore, have a valuation very much below its real value, and very much below the conventional rate fixed on bank shares by the action of this body, and that result almost necessarily follows in this case from the nature of the powers which have been conferred upon it. While it has the power and it is made the duty to take the valuation of bank shares as reported to it by the auditor of Cuyahoga County and make a comparison between it and the reports of the same character made to it by the eighty-eight other counties in the state, it receives no report in regard to *any other moneyed capital.* There is no means furnished it for the purpose of making a comparison of the property which the assessment sustains to the true value as between the bank *and other moneyed capital of the state* in the different counties thereof."

These facts and the opinion upon them are a complete refutation of the holding of the Supreme Court of Ohio that equality between State and national bank shares, answers all the requirements of the act of Congress. The certificate of division on which the case was decided expressly declared both classes of stock to have the same valuation.

The judgment of the court was founded on the manifest insufficiency in amount of State bank capital compared with other moneyed capital, to be employed as a basis of comparison with national banks, under language declaring that national bank shares shall not "be taxed at a greater rate than other moneyed capital in the hands of individual citizens of the state." The principle asserted throughout, as stated in *Boyer* vs. *Boyer*, 113 U. S., 639, and approved, *Aberdeen Bank* vs. *Chehalis County*, 166 U. S., 453, is, that bank shares "may not be subjected to taxation where a very material part, relatively of *other* moneyed capital in the hands of individual citizens is exempt." No

matter how invested, the phrase is "other moneyed capital" and not "other bank capital."

In *Supervisors* vs. *Stanley*, 105 U. S., 305, a discrimination between the taxation of national bank shares and moneyed capital in the hands of individuals was held to exist under the New York statute, although national and state bank shares were both taxed alike. Had these cases been examined by the Supreme Court of Ohio, and their *ratio decidendi* discovered, it would not have held that the conditions of the act of Congress are complied with by treating shares in state and national banks alike, for the converse is definitely held by them.

IV.

But more conspicuous and complete evidence of ill advisement of what this court had in fact held on the question involved in the present controversy is shown by a remark of the Supreme Court of Ohio at page 327 of the report of the case, Record page 28. The Court say:

"No examination of the provisions of the Ohio Statute by the Court is found in the opinion in the *Whitbeck* case except as to the procedure in demanding deduction, and even as to that there is no examination shown by the Court, but the finding of the Circuit Court is accepted as to such provisions."

For the purpose of showing that all intimations by Court or counsel, that this Court had not the Ohio Statutes before it when the *Whitbeck* case was considered and decided, are without a shadow of foundation for their support, we place in the hands of the Court the bound volume containing the record and briefs of counsel in that case, from which it will be seen that the charge is utterly groundless, and without the slightest support in fact. Every section of the Constitution and laws of Ohio bearing on the question, nearly or remotely, was laid before this Court, thoroughly argued and carefully considered.

The charge seems the more ridiculous when we consider the exhaustive review of the Ohio scheme of assessment and valuation of property for taxation and bank taxation, under the same laws, given by the learned Justice delivering the opinion in the Whitbeck case, in giving the opinion of the Court in *Pelton* vs. *Bank*, and *Cummings* vs. *Bank*, reported in Volume 101 U. S. Reports, pp. 143-153. Moreover, Mr. Justice Matthews, presumably familiar with the tax laws of Ohio, from a long and close previous connection with their administration, and who was a member of the Court and present when the case was argued, participated in its consideration, and concurred in its decision and judgment: a fact showing that within the view of that learned Justice there was nothing in *Mercantile National Bank* vs. *New York*, 121 U. S. 138, inconsistent with the judgment pronounced. We

believe a better reason can be found for the criticism of the *Whitbeck* case by the Supreme Court of Ohio, than the one expressed. That Court was committed to a view of the law stated in the ill-considered case of *Niles* vs. *Shaw, Treasurer*, 50 O. S., 370. In that case the point decided as stated in the syllabus was as follows:

"Our tax laws do not authorize the deduction from the value of shares in a national bank entered on the duplicate for taxation of legal bona fide debts owing by the holder of such shares of stock."

By "our laws" the Court meant the laws of Ohio. This statement of the effect of the Ohio laws is undoubtedly correct. This Court in the *Whitbeck* case said the same thing, and *because of such fact* held, as stated in the head note of the case, thereby giving effect to the act of Congress:

"That the owners of such shares are entitled to have a deduction of their indebtedness made from their assets valued as in the case of other moneyed capital."

In *Niles* vs. *Shaw*, supra, the fact seems to have been entirely overlooked by the Court, that the right to tax National Bank shares and the extent to which the exercise of the right may be carried, are created by the act of Congress. For, in the report of that case, no reference whatever is made to the act of Congress, nor to any restriction upon the laws of Ohio in the National Bank act respecting the taxation of National Bank shares, nor to any decision of this Court giving construction to the act and defining the limits within which the right to tax National Bank shares may be exercised, although the Niles case was decided long after the *Whitbeck* case was reported.

Between these two cases, the Supreme Court of Ohio, when it came to consider the question in this case, in which attention was directed to both the act of Congress and the decisions under it had one foot on the sea and the other on the dry land; and in determining which of the two was ill considered, and therefore incorrectly decided, self-vindication required it to select the latter. Hence, the *Whitbeck* case was animadverted upon in the manner above stated. We leave the record in the *Whitbeck* case, to speak for itself, and to pronounce upon the accuracy of the statement of the Court below that the decision thereof was given without considering the Ohio Statutes.

V.

Another misconception that entered into the judgment of the Supreme Court of Ohio is shown by the following language of the Court found on page 28 of the Record:

"In the *Whitbeck* case, it is assumed by the Court, or at least recited in effect, that the Statutes of Ohio are in substance the same as the Statutes of New York, and permit a deduction of debts from the total amount of personal property, and *Hills* vs. *Exchange Bank*, 105 U. S., 319, is cited as authority for the holding."

There is not in the *Whitbeck* case, a sentence, phrase, word or syllable which justifies this statement. It is true that the Statute of New York permitted a deduction of indebtedness from the value of all personal property except shares of incorporated banks. The fact that deduction of debts was authorized by the New York Statute from the value of tangible personal property cut no figure whatever in the case. It was not even claimed in argument that deduction of debts from the value of bank shares would follow from the fact that debts were permitted to be taken from the value of tangible personal property; nor did the Court consider that fact as in anywise infringing the act of Congress. But the term "All personal property" used in the New York Statute, from the value of which debts could be deducted, embraced "moneyed capital in the hands of individual citizens of the state," and this being exempt from taxation to the extent that debts were taken from it, a discrimination against capital invested in national bank shares would result, unless a like deduction was allowed in its favor. The attention of the Supreme Court of Ohio was called to the fact that this court had held in the *Britton* case, 105 U. S., 322, that it was the exemption of moneyed capital from taxation by the New York Statute, and not tangible personal property, that violated the restriction of the act of Congress. In the *Britton* case, page 323, the Court, speaking of *Supervisor* vs. *Stanley*, and *Hills* vs. *Exchange Bank*, reported in the same volume, say: "The three cases were advanced out of their order and heard consecutively," showing the claims made in the three cases were fresh in the mind of the Court. To show that the exemption of moneyed capital from taxation was alone considered to be the source of trouble, we quote further from the opinion of Mr. Justice Miller:

"The objection made to the Indiana Statute is the same as that made against the New York Statute, viz: that it permits the tax payer to deduct from the sum of his credits, money at interest or other demands, the amount of his bona fide indebtedness, leaving the remainder as the sum to be taxed, while it denies the same right of deduction from the cash value of bank shares. A discrimination is attempted to be drawn between the Indiana Statute and the New York Statute, because the former permitted the deduction of the taxpayer's indebtedness to be made from the valuation of *his personal property*, while in Indiana he can only deduct it *from his credits*. And undoubtedly there is such a difference in the laws of the two states. But if one of

them is more directly in conflict with the act of Congress than the other, it is the Indiana Statute. In its schedule the subject of taxation from which the taxpayer may deduct his bona fide indebtedness is placed under two heads, as follows:

1. Credits or money at interest, either within or without the state at par value.

2. All other demands against persons or bodies corporate either within or without this state.

Total amount of all credits.

The act of Congress *does not make the tax on personal property* the measure of the tax on bank shares in the state, *but the tax on moneyed capital in the hands of the individual citizen.* Credits, money loaned at interest, and demands against persons or corporations are more purely representative of moneyed capital than personal property, so far as they can be said to differ. Undoubtedly there may be much personal property exempt from taxation, without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital. But the rights, credits, demands and money at interest mentioned in the Indiana statute, from which bona fide debts may be deducted, all mean moneyed capital invested in that way.

It is unnecessary to repeat the argument in *People* vs. *Weaver*, 100 U. S., 539, on this point. We are of the opinion that the taxation of bank shares by the Indiana statute, without permitting the shareholder to deduct from their assessed value the amount of his bona fide indebtedness, as in the case of other investments of moneyed capital is a discrimination forbidden by the act of Congress."

In the light of the express declaration of this Court in the *Britton* case considered with the *Stanley* case, that the act of Congress does not make the tax on personal property the measure of the tax on bank shares in the state, but the tax on moneyed capital in the hands of the individual citizens, what becomes of the intimation of the Court below, that the tax on tangible personal property was considered by this Court in the *Whitbeck* case as the measure of the tax to be imposed on National Bank shares? The very cases cited to prove the statement clearly demonstrate its inaccuracy.

VI.

We shall consider but one other statement of the Supreme Court of Ohio made as one of the predicates of its judgment. It was claimed by opposing counsel, and seemingly agreed to by the Court, that *The First National Bank of Garrett* vs. *Ayres*, 160 U. S. 660, controlled the present case instead of *Whitbeck* vs. *Mercantile National Bank*, because of the alleged similarity between the Kansas Statute, defining credits, and the Ohio Statute. At page 28 of the Ohio opinion, the judge says:

"The sections of the Kansas Statute under review in the Ayres case are almost identical with Sections 2730 and 2737 of our own state, and it would seem that the facts being the same, the same construction should obtain as to each."

There would be much force in this conclusion if this statement were true, or if credits under the Ohio Statute and in Ohio are as limited as they were held to be in Kansas by the Supreme Court of that state in the report of the Ayres case 53 Kansas, 457. It, however, is perfectly demonstrable that they are not. The Court there said:

"It would seem to have been the view of the Legislature that only those *unsecured* credits which were not in general investments for profit, but were in the ordinary course of honest dealing are *applied as soon as received to the extinguishment of current debts and obligations*, should be subject to the deduction, and that, in fact, such credits represented no capital whatever when there was a corresponding debt to the payment of which they of right should be applied."

The Court had already said, p. 459, that the principle declared in *Whitbeck* vs. *Mercantile National Bank, supra*, was, that there must not be a substantial discrimination against bank capital. It then said:

"The question of minor exemptions is a matter of state policy with which the Court will not interfere, and that when only some *minor or inconsiderable portions* of capital are relieved from the burden of taxation, the validity of taxes levied on National Banks will not be thereby affected."

If the Supreme Court of Ohio had carefully examined the Kansas Statute, and reflected for a moment upon one or two items of difference between the two statutes, it could not have said that they are nearly identical. Under the Kansas Statute, debts cannot be taken from credits secured by a lien on realty, nor from judgments, nor would it seem from promissory notes in view of the above holding of the Kansas Supreme Court, *that credits as soon as received were to be applied to the extinguishment of current debts.*

Section 6847 of the Kansas Statute defines credit "as meaning and including every demand for money, labor, or other valuable thing, whether due or to become due, but not secured by a lien on real estate."

Section 6851 provides that "debts owing in good faith by any person, company or corporation, may be deducted from the gross amount of credits belonging to such person, company or corporation, provided such debts are not owing to such person, company or corporation as depositors in any bank or banking association, or with any person or firm engaged in the business of banking in this state or elsewhere."

From this statute it appears that credits secured by vendors liens, or other equitable liens, or by mortgage on real estate, are not subject to deduction; nor are judgments. In *Dutton* vs. *Citizens National Bank of Concordia*, 53 Kansas 444, the Court said the law provided "that all corporate stocks, all money secured by judgment or lien on real estate, and substantially *all moneyed capital of every description, invested for profit*, shall be subject to taxation *without deduction of indebtedness*." This is entirely variant from the laws of Ohio. According to the Federal Census of 1890. (See report eleven, on Mortgage debts, Volume entitled "Real estate mortgages", and "The Mortgage debt of the United States", page 94, account of mortgage indebtedness given by Counties, page 735), there was in Kansas a mortgage indebtedness January 1, 1890, on farm and city property, of $243,146,826, not a dollar of which was a credit. In Ohio, according to the same report, page 94, the state at large, and by counties, page 742, the mortgage debt on farm lands, village and city lots amounted to $259,842,108, every dollar of which was a credit subject to the deduction of debts. *Myers* vs. *Seaburger*, 45 O. S., 232. The amount due on land contracts in Ohio is also a credit. *Reinboldt* vs. *Raine*, 52 O. S., 160. Not so in Kansas. If opposing counsel question the correctness of these census figures, we will lay the report before the Court. We suppose this mode of proof and reference entirely proper, in view of the fact that the act of Congress of February 22, 1890, Volume 26, page 13, Laws of the United States, 89-91, requires the superintendent of the census "to ascertain the number of farms and homes which are under mortgage, and the amount of the mortgage debt of the United States, and the value of the property mortgaged." The same volume, page 880, contains an act providing among other things, that 5,000 copies of each of the following final volumes shall be printed: one on "Wealth, debt and taxation", and one on "Recorded indebtedness". It is from the last named volume that we obtain the amount of the mortgage indebtedness in Kansas and Ohio. The facts shown by these reports are moreover facts of which the Court takes judicial notice. In the Dutton case above cited from Kansas, page 460, the Court say:

"We do do take judicial notice of the fact that debts secured by liens on real estate, money invested in corporate stocks of all kinds and descriptions including railroad, banking, insurance, loan and trust companies, constitute the great bulk of the moneyed capital in this state."

This Court in *Whitbeck* vs. *The Mercantile National Bank*, took judicial notice that credits in Ohio, embracing as they do mortgage indebtedness, and all other indebtedness secured by lien on real estate as well as all judgments, and every conceivable chose in action, except

municipal and company bonds, constitute such a material and substantial part of the moneyed capital of the state as to require money invested in National Bank shares to be placed on an equality with them in the mode of their valuation for taxation. Is it for a moment to be supposed that the Supreme Court of Kansas would have held the mortgage indebtedness of that state to be so insignificant as to amount only to what the Court called a "minor exemption," had the statutes of that state declared it to be a credit? It is a matter of public history that that state is burdened with an enormous mortgage debt amounting to vastly more than all other money investments therein. And it is a well known fact that mortgage investments in the middle and western states are investments of moneyed capital for interest and profit upon the investment.

Another difference between the Ohio and the Kansas statute relates to money deposited in savings banks. In Ohio, such deposits, requiring as they do a time notice before withdrawal, are credits of the depositors. The Statute of Ohio defining credits, expressly includes deposits in banks or with individuals other than such as are held to be money. To be money, they must be subject to order. The Kansas statutes, Section 6851, provides:

"Debts owing in good faith by any person, company or corporation, may be deducted from the gross amounts of credits belonging to such person, company, or corporation *provided* such debts are not owing to such person, company or corporation as depositors in any bank or banking association, or with any person or person or firm engaged in the business of banking in this state or elsewhere."

This provision embraces certificates of deposit as well as all other deposits. The report of the auditor of the state of Ohio which the Supreme Court of Ohio resorted to for its figures for the taxable valuation of the property referred to in the finding, at page 336, shows that deposits in one savings bank in the city of Cleveland, the Society for Savings, amounted in 1893 to $21,915,350.81, all of which is subject to deduction of the debts of the depositors in fixing their value for taxation, a sum more than double the amount of all moneyed investments in Ohio outside of that invested in bank shares. I am aware that the Court held in Mercantile National Bank vs. New York 121, U. S., 138, that a statute authorizing exemption from taxation of savings deposits is not in conflict with the national bank act because of the character of the investment. Hence I only make reference to these deposits as showing in Ohio they are credits while in Kansas they are not. But there is another very matural difference between the Kansas statute and the Ohio statute, relating to credits from which debts may be deducted in their assessment for taxation.

Building and loan associations are corporations organized in Ohio for the purpose of raising money to be loaned among its members and depositors. They are organizations for profit by loaning money as fully as are banks, and the shares of non-borrowing members are taxed as credits, the value of which is made up by deducting therefrom the indebtedness of the shareholders.

Section 3636–2 provides that "the capital stock named in the Articles of Incorporation shall be deemed to refer to the authorized capital and the organization which may be completed and business commenced when five per cent. thereof is subscribed."

Section 3636–3. "Such corporations shall have power" (inter alia) "To receive money on deposit from time to time to the extent necessary to meet the demands of its members and depositors, but shall not pay interest thereon exceeding the legal rate, to issue stock to members on such terms and conditions *as the Constitution and By laws may provide;*

"To borrow money not exceeding twenty per cent. of the assets and issue its evidence of indebtedness therefor."

"To make loans to members and depositors on such terms, conditions and securities *as may be provided in the Constitution and By-laws.*" *

To make such annual or semi-annual distribution of the earnings after paying expenses and setting aside a sum for the reserved fund as hereinafter provided as the Constitution and By-laws may prescribe.

To increase or decrease its authorized capital, or the face value of the shares at any time by a majority vote of the Board of Directors.

To provide by constitution, adopted by its members and By-laws adopted by its Board of Directors for the proper exercise of the powers herein granted and the conduct and management of its affairs, and all such powers as are necessary and proper to enable such corporation to carry out the purpose of its organization."

Section 3836–4 provides that "the officers of such association who have charge and possession of money, securities or property shall give bond before entering on their duties to the satisfaction of the Board of Directors for the faithful performance of the same and the safe keeping and proper application of all money or property coming into their hands."

Section 3836–6 provides, "a portion of the earnings to be determined by the Board of Directors shall also be reserved annually or semi-annually for the payment of contingent losses as provided in Section 5 of this act and the residue of such earnings *shall be transferred as a dividend annually, or semi-annually, in such proportion to the credit of the members as the corporation by its Constitution and By-laws may be provided,* to be paid to them at such time and in such manner in

conformity with this act as the corporation by its Constitution and By-laws may provide."

We have not quoted all the provisions of this act, but a sufficiency to enable the Court to see that power is given to do a quasi-banking business by borrowing money and loaning the same to members and depositors. If an outsider desires a loan, all he has to do is to become a depositor in a small sum.

Section 3836-7 provides for the taxation of shares as follows:

"The shares and loans advanced to its members shall be exempt from taxation, except, shares or stock upon which no loans have been made, or money advanced, by the company, shall be considered and held as credits, and the said members individually shall return for taxation the number of shares held by them and the true value thereof in money on the day preceding the second Monday in April in each year, and the same shall be assessed at such valuation for taxation and taxes as other property."

The Act of May 8, 1886, 83 O. L., p. 116 provided, that stock or shares of individual members or depositors of such corporation, shall be considered and held as credits.

By the act of April 13, 1889, 86, O. L., p. 293, the law was changed to its present reading. The section was re-enacted May 1st, 1891, vol. 88, O. L., p. 471, with no change in the phraseology relating to taxation.

By the "full and detailed official report" of May 1st, 1894, of the inspector of building and loan associations of Ohio, of the affairs and business of each association which section 2836-16 of the Revised Statutes of Ohio requires to be made each year showing the financial condition for the preceding year, it appears at page 11,

"That on the 31st day of December, 1893, there were in Ohio 765 associations * * * . The tables in this report cover the business done by 741 associations with a total authorized capital of $721,179,500, of which there was subscribed and in force $281,460,205.32. These 741 associations had a total of depositing members of 183,983; borrowing members, 68,903 and a total membership of 252,886."

A detailed tabular statement made on page 58-9 of the report shows for 1893,

Total number of shares of stock in force at close of associations' fiscal year ending in 1893	$1,122,688
Total number upon which loans have been made	$308,465
The percentage of borrowing to total membership	27.2
Dividend distributed to running stock	$2,786,053.27
Dividends distributed to paid-up stock	$990,080.64
Average rate of interest charged borrowed	6.13
Average rate of dividends declared	6.22
Average loans on mortgage security for each of the 741 associations	$92,401.39
Average loans on other security for each association	$6,339.04
Total	$98,706.43

These figures show, in connection with the Statute under which the business is carried on, that the moneyed capital invested in these associations is invested for profit by the use of money, *as interest*, and that cash dividends, exceeding in amount the usual bank dividends, are paid to shareholders; they further show that loans made by the 741 associations amounted in the year 1893 to $73,187,478.63, of the accumulations on which they received and distributed over 6% in dividends to shareholders; further the nature and character of the business show the investments of the shareholders to be of "moneyed capital in the hands of individual citizens" within the meaning of that term as employed in Section 5219 of the Revised Statutes of the United States.

It appears that 73% of the shareholders or owners of the paid in capital, being non-borrowers, are required to return their shares for taxation as credits, the value of which was ascertained by the deducting from the value thereof, their legal bona fide debts. The amount of capital subscribed and in force in 1893, amounted to $281,460,015.32, 73% of which, taxable as credits, amounted to the sum of $205,465,803.88. This amount of moneyed capital in Ohio was in the year 1893, invested in business carried on under the authority conferred by statute, with the sole object to loan the same for profit, and its owners were expressly authorized, when returning the same for taxation to deduct from the value of their shares all legal bona fide debts by them owing. To deny the same right to the owners of national bank shares would, we respectfully submit, be a gross and palpable discrimination against capital invested in such shares.

In *Mercantile Bank vs. New York*, 121 U. S. 121, it was said:

"That the terms of the act of Congress includes shares of stock or other interests owned by individuals *in all enterprises* in which the capital employed in carrying on its business *is money*, where the object of the business is the making of *profits by its use as money*. The moneyed capital thus employed is invested *for that purpose in credits by way of loans*, discount or otherwise which are from time to time according to the rules of the business, reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way *invested in loans or in credits for the payment of money* either as an investment of a permanent character *or temporary with a view to selling and repayment and reinvestment*."

In *Palmer vs. McMahon*, *135* U. S., 667, in speaking of moneyed capital it was said:

"It embraces capital employed in National Banks and capital employed by individuals when the object of their business is the making of profits by the use of their moneyed capital as money?"

This is what building and loan associations in Ohio are organized for, and the result of their business shows large profits realized purely

from the investment of moneyed capital as money. That the legislature regarded shares in building and loan associations the same as bank shares as respects their income producing function is evident from the fact that the shares in each are taxed to the stockholders, while no other corporate shares are taxed at all, except partially through the medium of taxing the corporate property. We have deemed it proper to review the grounds of the decision of the Supreme Court of Ohio, and the argument in support thereof, with a view of showing that the decision rests throughout on false premises and unsound reasoning, and therefore that its conclusions and judgment are necessarily erroneous. We now examine into the amount of moneyed capital actually returned for taxation in the year 1893.

VII.

STATEMENT OF CREDITS AND OTHER MONEYED CAPITAL IN OHIO FOR 1893, SHOWING THE FORMER TO BE MORE THAN DOUBLE THE LATTER.

By the official report of the auditor of the state of Ohio, for 1893, copies of which we place before the court, referred to by the Supreme Court of Ohio, and which, it was agreed by counsel, the court might judicially notice, it appears that the moneyed capital invested in credits was more than double the amount of all other moneyed investments in the state.

Section 2737 of the Revised Statutes of Ohio, requires the statement of property returned for taxation so far as it relates to money or moneyed capital or investments to set forth:

"12th. The value of the property which such person is required to list as a banker, broker or stock jobber.

13th. Moneys on hand or on deposit subject to order.

14th. The amount of credits as hereinbefore defined.

15th. The amount of all moneys invested in bonds, stocks, joint stock companies, annuities or otherwise.

16th. The monthly average, amount or value for the time he held or controlled the same within the preceding year, of all moneys, credits or other effects within that time invested in or converted into bonds or other securities of the United States or of this state not taxed to the extent he may hold or control such bonds or securities on said day preceding said second Monday of April, and any indebtedness created in the purchase of said bonds or securities shall not be deducted from the credits under the 14th item of this section."

These provisions cover all investments in moneyed capital.

We here give a statistical summary of the report of the auditor of state for 1893, of all property listed in the state for taxation:

STATISTICAL SUMMARY OF THE REPORT OF THE AUDITOR OF STATE OF OHIO FOR 1893.

Tangible Personal Property in State.	*pp.*	*Assessed Valuation.*
Merchants' stock	223	$43,124,298
Manufacturers' stock	223	17,540,253
Money in possession or on deposit subject to order	223	41,560,576
Horses	217	44,160,679
Cattle	217	22,312,002
Mules, etc.	217	1,004,070
Sheep	219	9,289,942
Hogs	219	5,331,283
Carriages	219	5,535,874
Watches	220	1,857,268
Pianos and organs	220	5,017,901
Dogs	225	76,587
All other personal property not named	221	39,576,428
Railroad property	293 and 305	106,323,762
Express, telephone and telegraph companies	345	5,022,778
Other corporation property (total on p. 225 less the two foregoing items and bank shares)		37,611,784
Total		$385,345,485

INTANGIBLE PROPERTY IN STATE RETURNED FOR TAXATION.

Credits after deducting *bona fide* debts (p. 223)		$111,173,728
Banker, broker or stock jobber (p. 223)	$ 505,084	
Bonds, stocks, annuities or otherwise (p. 225)	9,676,374	
National Bank shares (p. 313)	37,506,418	
State Bank shares (p. 317)	6,462,613	
Average value of property converted into nontaxable securities (p. 225)	604,531	
		54,755,020
Excess of credits over all other moneyed capital		$ 56,418,708
Total value of all personal property returned by township assessors (p. 227)		$551,274,233
Total value of personal property on duplicate (p. 198)		568,567,255
Ergo-value added by auditors		17,897,553
Real estate in cities and villages 198		597,848,119
Real estate not in cities and villages 198		586,575,556
Personal property 198		568,567,255
1893 total valuation 198		$ 1,752,990,930

Take out moneyed capital or investments proper, and separately state it, we have invested in banks, state and national	$43,969,331
"Invested in bonds, stocks, joint stock companies, annuities and otherwise"	9,672,374
Amount returned by banker, broker and stock jobber	505,084
Add average value of property convertible into non-taxable securities	604,533
Making a total of	$54,755,020

Which, taken from $111,173,728, credits, leaves $56,418,708 more of credits than of all other moneyed investments in the state including money invested in bank shares, and as before said; more than double all other moneyed capital; the very *excess* of which over all investments in other moneyed capital, more than equals the entire amount of the latter. If we add to the sum of all moneyed investments, exclusive of credits, all money in possession and on deposit for the year 1893 in the state, amounting to $41,590,576.00 the sum total falls short

of equaling the amount of credits by $13,164,424. The credits returned and taxed also exceeded the taxable value of the entire railroad property of the state, and but a few dollars short of three times the amount of the valuation of all other corporate property of the state. Notwithstanding this showing and the fact that presumably a large amount of credits existed from which debts were actually taken, in making lists for taxation, we are told in a solemn opinion, that the Statutes of Ohio do not allow a deduction equal to the bona fide debts to be made from the amount of the assessments of moneyed capital in general, *but only "from a small and comparatively insignificant* amount of moneyed capital, called credits."

The Supreme Court of Ohio agrees that credits are moneyed capital, but seems unwilling to concede that $111,173,728 of moneyed capital is a significant sum compared with $54,755,020 of other moneyed capital returned for taxation. In *Whitbeck* vs. *The Mercantile National Bank*, *supra*, the Court held "That an increase of *eight and one-third per cent.* of the valuation of National Bank shares over the valuation of other moneyed capital, was a discrimination prohibited by the act of Congress." It appeared in that case that National Bank shares were valued for taxation at 65 per cent. of their actual value, while other moneyed capital was valued at 60 per cent. This difference in the valuation of the two classes of property was held to violate the act of Congress inhibiting discrimination, and the collection of the tax on the increase was enjoined. Here over two-thirds of the entire amount of all the moneyed capital of the state, and more than three times the amount invested in National Bank shares, are subject to exemption through deduction of indebtedness. If the owners of the $111,173,728, credits returned, had owed debts to that amount, the state would have realized no tax upon any portion of that sum, and the result would have been a large increase of the tax on National Bank shares to supply the deficiency; and if we were authorized to go outside of moneyed capital proper, as that term has been defined for the purpose of comparison with other moneyed investments, we would find an equally marked inequality in other items.

Investments in stocks in domestic corporations are expressly exempted from taxation by statute. By the laws of Ohio, Section 2744 of the Revised Statutes—all domestic corporations, except railroad, express, telegraph, telephone, insurance companies, and banks, are required to return to the auditor of the county wherein is their principal office, their capital for taxation. And by Section 2746 it is expressly provided:

"That no person shall be required to list for taxation any share or shares of the capital stock of any company the capital stock of which is taxed in the name of said company."

"Capital Stock," as used in this section, was held in *Davis* vs. *Jones*, 35 O. S., 474, to mean capital. Hence the valuation of bank shares for taxation at their actual value in money, which is determined from the value of the capital, surplus and franchise, while share owners in other corporations only pay through the company on the valuation of the capital of the company, is clearly a discrimination against capital invested in national bank shares. It is also an especial violation of the constitution of Ohio which explicitly requires equality and uniformity of taxation as respects all classes of property.

To summarize some of the foregoing claims we have $111,173,728 of taxable credits returned for 1893 and actually taxed, as against $54,755,020 of all other moneyed capital including money invested in banks.

We have a large amount of credits from which debts are actually deducted. The above amount of credits exceeds the entire valuation of all the railroad property in the state, and is nearly three times the amount of all other taxable corporate property, exclusive of the capital of banks. It is more than three times the amount invested in national banks. We have a marked and material discrimination between the valuation of national bank shares, and capital invested in private banks and in favor of the private banks. We have two hundred millions of moneyed capital invested as money for profit in building and loan associations, the shares of which are taxed but not until after deduction from their value of all legal bona fide debts of the owner.

A few further references and we draw the discussion to a close.

In *Boyer* vs. *Boyer*, 113 U. S., 695; referring to the cases of *People* vs. *Weaver*, 100 U. S., 534, *Pelton* vs. *National Bank*, 101 U. S., 143, *Cummings* vs. *National Bank*, 101 U. S., 153, *Supervisors* vs. *Stanley*, 105 U. S., 305, *Evansville Bank* vs. *Britton*, 105 U. S., 323; the Court speaking by Mr. Justice Harlan, say: "In *Pelton* vs. *National Bank* it was held, that any system of assessment of taxes which exacts from the owner of shares of a National Bank a larger sum in proportion to their actual value than it does from the owner of other moneyed capital valued in like manner, does tax them at a greater rate within the meaning of the act of Congress."

"From these cases may be deduced certain rules for the construction of that act:

1. That the words 'at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens refer to the entire process of assessment, which, in the case of National Bank shares, includes both their valuation and the rate of percentage on such valuation.

2. That a state law which permits individual citizens to deduct their just debts from the valuation of their personal property of every kind, other than National Bank shares, or *which permits* the taxpayer

to deduct *from the sum of his credits, money at interest*, or *other demands to the extent of his bona fide indebtedness*, leaving the remainder to be taxed, while it denies the same right of deduction from the cash value of bank shares, operates to tax the latter at a greater rate than other moneyed capital."

The Court, in language not to be misunderstood, condemns every attempt to evade the restrictions imposed by the act of Congress. It further says in the same case:

"These decisions show that, in whatever form the question has arisen, this Court has steadily kept in view the intention of Congress not to permit any substantial discrimination in favor of moneyed capital, in the hands of individual citizens, as against capital invested in the shares of national banks. In *People* vs. *Weaver*, the Court said:

"As Congress was conferring a power on the states which they would not otherwise have had to tax these shares, it undertook to impose a restriction on the exercise of that power, manifestly designed to prevent taxation which should discriminate against that class of property as compared with other moneyed capital. In permitting the states to tax these shares, it was foreseen that the states might be disposee to tax the capital invested in these banks oppressively. This might have been prevented by fixing a limit on the amount. But Congress, with due regard to the dignity of the states, and with a desire to interfere only so far as was necessary to protect the banks from anything beyond their equal share of the public burdens, said: 'You may tax the real estate of the banks as other real estate is taxed, and you may tax the shares of the bank as the personal property of the owner, to the same extent you tax *other moneyed capital invested in your state*.' It was conceived by this qualification of the power of taxation, equality would be secured and injustice prevented."

In *Mercantile Bank* vs. *New York*, 121 U. S., 138, the holding in *Evansville Bank* vs. *Britton*, *supra*, was distinctly approved, as will be seen from an extract from the opinion given below. That was not a case involving the question of the right to deduct debts from credits under the laws of New York. That right was conceded. The statement of the case, page 144, of the report, shows that debts of various stockholders amounting to $89,128 were deducted from the value of their shares. The question involved was a broader one, whether the mode of taxation adopted by the statute of New York in reference to its domestic corporations, other than trust companies and savings banks, did not operate in such a way as to make the tax assessed upon shares of National Banks greater than that imposed upon other moneyed capital in the hands of individual citizens. This question was answered in the negative, and while the Court said that the main purpose of fixing limits to state taxation on investments in shares of National Banks was to render it impossible for the state in leving such tax to

create and foster an unequal and unfriendly competition by favoring institutions or individuals carrying on a similar business and operations and investments of like character, in defining "similar business and operations and investments of like character," it expressly embraced credits of the kind defined by the Ohio Statute. The Court speaking by Mr. Jusitce Matthews at page 157 says:

"The terms of the act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way *of loan, discount, or otherwise*, which are from time to time, according to the rules of the business, reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, *invested in loans*, or *in securities for the payment of money*, either as an investment *of a permanent character*, or *temporarily with a view to sale or repayment and reinvestment*. In this way the moneycd capital in the hands of individuals is distinguished from what is known generally as personal property. Accordingly, it is said in *Evansville Bank* vs. *Britton*, 105 U. S., 322: "The act of Congress does not make the tax on personal property the measure of the tax on the bank shares in the state, but the tax on moneyed capital in the hands of the individual citizens. *Credits, money loaned at interest*, and demands against persons or corporations are more purely representative of moneyed capital than personal property, so far as they can be said to differ. Undoubtedly there may be said to be much personal property exempt from taxation without giving bank shares a right to similar exemptions, because personal property is not necessarily moneyed capital. But the *rights, credits, demands, and money at interest*, mentioned in the Indiana statute, from which bona fide debts may be deducted, *all mean moneyed capital invested in that way*. This definition of moneyed capital in the hands of individuals seems to us to be the idea of the law, and ample enough to embrace and secure its whole purpose and policy."

There was a large amount of moneyed investments which under the Indiana statute were not embraced in the term "credits." In *Wasson Treasurer* vs. *The First National Bank Indianapolis*, 107 Ind. 206, it is held:

"Under the tax law of 1881 (Indiana) a taxpayer may deduct his bona fide debts from all his moneyed capital and credits, *except* money on hand or on deposit, money loaned, *bonds, and shares of stock in corporations;* and the Courts will take judicial notice of the fact that the moneyed capital from which the taxpayer may so deduct his debts is a material portion of the whole moneyed capital of the state."

The term "money loaned" was held to mean money loaned "on call," making it equivalent to money on deposit. The Indiana statute excluded from the denomination of credits, bonds and shares of stocks in corporations. The Ohio Statute only excludes from the denomination of credits investments in bonds, issued by the state or some of its subdivisions, and companies, and investments in stock. In Ohio, a bond of an individual is a credit. So that in any view that can be taken credits in Ohio exceed in value and kind, credits in Indiana, but otherwise are very similar in character. To hold Ohio credits are not moneyed capital in the hands of individual citizens requires the overruling of the Britton case, as well as the Whitbeck case, and as well the rejection of the principle on which *Boyer* vs. *Boyer*. *Supervisor* vs. *Stanley*, and *Hill* vs. *Exchange Bank* were decided.

The following state cases are in entire accord with *Whitbeck vs. The Mercantile National Bank; Wasson Treas. vs. The First National Bank of Indianapolis*, 107 Ind. 206; *Equitable Life Ins. Co. vs. Board of Equalization*, 74 Iowa, 181-270; *Miller vs. Heilborn*, 58 Cal.; *Ruggles vs. The City of Fond du Lac*, 53 Wis., 436; *Maguire vs. Board of Revenue*, 71 Ala., 401; *McAdem vs. Commissioners*, 97 N. C., 555.

The fact is not to be overlooked that ten years have elapsed since the rendition of the judgment in the Whitbeck case and that the legislature of Ohio with full knowledge of the rule there laid down, has permitted the Ohio Statute relating to credits and all others bearing on the subject to remain unchanged in any particular, thereby evincing entire satisfaction with the rule declared and the practice under it. The statute of Ohio defining credits, has been in force nearly fifty years, and its constitutional validity, once questioned, has been recently affirmed by the Supreme Court in *Treasurer* vs. *Bank*, 47 O. S., 522; it was there held that the taxable credits of an unincorporated bank were to be determined by deducting its bona fide debts from its legal claims and demands.

The overruling of *Whitbeck* vs. *Mercantile Bank* would, moreover, have a singular and an unjust effect among the national banks in Ohio; it would result in creating a discrimination in favor of the shareholders of certain banks whose right to the deduction of their bona fide debts has been established by adjudication as against those who were permitted to exercise the right without objection and who consequently are without a judgment in their favor.

At the term of the Circuit Court for the Northern District of Ohio, at which judgment was given to the Mercantile National Bank enjoining Whitbeck as Treasurer and his successors in office from collecting the disputed tax, a like judgment was given in favor of seven other national banks of Cleveland, and by the state court a like judgment was given to other national banks, the amount in controversy in

the latter cases being below the requisite sum to confer jurisdiction on the Federal Court. These judgments are in full force and operation. The laws, both state and national, under which they were given, remaining the same, the questions decided by them have passed, *in rem judicatem*; and within the recent holding of this court in *New Orleans* vs. *Citizens' Bank*, 167 U. S., 371-387, and in *S. P. R. R. Co.* vs. *W. S.*, 168 U. S., 48, the banks having these judgments in their favor have only to plead them to establish the right of their shareholders to the deduction, whenever such right is drawn in question. The banks heretofore enjoying the same right without having been required to establish it by suit, would be denied the privilege enjoyed by the Cleveland banks solely through the effect of such adjudication. The overruling of the Whitbeck case, therefore, would necessarily work manifest injustice to the smaller banks throughout the state, and in effect fritter away the just restriction upon the taxation of national bank shares found in the act of Congress by which the right of the state to tax them at all, is created.

Respectfully submitted,

W. W. BOYNTON,

Solicitor for the Plaintiff in Error.

No. 137.

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Reply Brief of the Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

Filed Jan. 9, 1899.

No. 137

The First National Bank of Wellington, Ohio,
PLAINTIFF IN ERROR,

VS.

H. P. Chapman, as Treasurer of Lorain County, Ohio,

In Error to the Supreme Court of the State of Ohio.

W. W. BOYNTON,
PLAINTIFF'S SOLICITOR.

(16,630.)

In the Supreme Court of the United States.

THE FIRST NATIONAL BANK OF WELLINGTON, OHIO,

vs.

H. P. CHAPMAN, as Treasurer of Lorain County, Ohio.

REPLY BRIEF OF PLAINTIFF IN ERROR.

We beg the attention of the Court to a few observations in reply to what is said, and upon what is omitted to be said, by counsel for the defendant in error in their brief. Counsel seem to have wholly abandoned the endeavor to sustain the comparisons made by the Supreme Court of Ohio of credits with the value of all other taxable property in the State real and personal to reach its conclusion that no discrimination resulted to moneyed capital invested in National Bank shares, because of the exemption of credits from taxation through deduction of debts; nor do they undertake in the least to impair the strength of the proof we make in our original brief of the fact that money invested in credits in Ohio constitutes the great bulk of the moneyed capital of the State, but they seek to obtain a technical advantage by now claiming that this Court cannot notice or look into the report of the State Auditor in order to ascertain the relative value of National Bank shares as compared with other moneyed capital. This claim seems a little remarkable in view of the fact that this very report was put before the Supreme Court of Ohio by the Attorney General to enable it to ascertain the amount of credits and their relative amount compared with other moneyed capital, and in view of the additional fact that such report was not only examined by the Supreme Court of Ohio, but the facts and figures drawn from it were the foundation of the Court's judgment. To show that there is no doubt about either of these propositions we quote, both from the brief of the Attorney General in the State Court, and from the opinion of the Court as well, to show that its

judgment was largely founded upon facts drawn therefrom. On the first page of the brief of the Attorney General filed in the Supreme Court of Ohio he says:

"The public records in the Auditor of State's office, of which for the purpose of this application (hearing) the Court may take judicial knowledge, show the following state of facts:

Capital stock of National Banks in Ohio	$ 45,178,000.00
Appraised value (including real estate)	36,660,000.00
Value of credits	106,385,000.00
Grand duplicate of all taxable property	1,742,520,000.00
Deducting the value of credits	1,636,135,000.00

or in other words, the value of credits, after deducting debts which is a class of property under the laws of the State of Ohio that allows the taxpayer to offset thereon his indebtedness, is but 6½ per cent of the grand duplicate of the taxable property of the State of Ohio."

"Or, in other words, we claim that inasmuch as 93.5 per cent of all of the actual taxable value of the property of the State of Ohio, which includes real estate, rights of way, franchises, stocks and bonds that can not offset any debts against the same, therefore there is no discrimination against the $45,000,000 of bank stock which is valued by the present taxing officers at from 60 to 65 per cent of its market value, placing it upon the exact footing of all other property, save and except the 6½ per cent of credits."

Here we find that on that hearing the report of the Auditor of State was laid before the Court by the Attorney General with a misquoted table of what it contained, and by it, and the claim founded on it by the Attorney General, the Court was led into the error of supposing that money invested in "real estate, rights of way, franchises, stocks and bonds" was of so large amount compared with credits, that no discrimination against capital invested in National Bank shares resulted from allowing deduction of debts from credits in fixing the value of the latter for taxation. We not only have the above matter taken from the State Auditor's report by the Attorney General and his claim made upon it when the case was argued and considered in and by the Supreme Court, but that the Court considered and founded its judgment largely upon it, is evident from the following extracts from the opinion. At page 26 of the record the Court say,

"That the taxable property of the State is classified as follows:" The Court then divides the property of the State as we have given it in our original brief, into a class from which no deductions can be made, and that from which certain legal *bona fide* debts may be deducted, and then say: * * * * "The former amounting in the whole State as shown by the *official reports* for the year 1893 to over $1,636,000,000; that from which certain legal *bona fide debts* may be deducted, consists of credits alone. * * * and the credits in the State (subjected to taxation in the year 1893) as *shown by the official reports* amounted to only $106,000,000."

At page 27 the Court in speaking of the public property exempt from taxation said, "the same amounts to over $160,000,000 in value as *shown by the official reports*, and then adds "it *thus* appears that credits from which certain debts may be deducted form but a small and comparatively insignificant part of *our taxable property*, and are even less than our non-taxable property."

At page 30 the Court say,

"While the official blanks of assessors require each person to give a statement of the total amount of his credits, and then the total amount of his legal *bona fide* debts and the balance of credits over debts is carried out as the amount to be taxed, the amount of debts so deducted has not been carried into the *official reports*.

The only means the Court had of knowing that official blanks of the assessors required each person to give a statement of the total amount of his legal *bona fide* debts as well as credits, was to refer to the blank itself as there is no Statute of Ohio requiring blanks to contain any such matter.

Again at page 30 the Court say,

"There are about $46,000,000 invested in National Bank shares in this State."

A fact which the Court derived from the State Auditor's Report,—and could not have known without.

At page 31 the Court say,

"To put National Bank shares upon an equality with the most favored class of property would free them from all taxation, as more than one hundred and forty millions in value of public and other property is relieved from all taxation in this State, while the National Bank stock amounts to only forty-six millions."

These facts are only ascertainable from the State Auditor's report employed by the Court to obtain them. In view of the matter above given from the brief of the Attorney General in the State Court, and the use made by the Supreme Court of Ohio of the official report of the State Auditor, to deny its use here, we respecfully submit, would be a travesty on justice. Besides this, we respectfully submit that the State Auditor's report was perfectly competent. Section 2737 of the Revised Statutes of Ohio requires the owner of property to list among other things "moneys on hand or on deposit subject to order, his credits, and the amount of moneys invested in bonds, stocks, joint stock companies, annuities or otherwise," and "the monthly average amount or value for the time be held or controlled the same within the preceding year, of all moneys, credits or other effects within that time invested in, or converted into bonds or other securities of the United States or of this State not taxed, to the extent he may hold or control such bonds or securities on said

day preceding the second Monday of April." Section 1034 requires the Auditor to make out in a book to be prepared for that purpose, a complete list or schedule of all the taxable property in his county and the value thereof as equalized, in the form following: * * * "the value of personal property, moneys, credits, investments in bonds, stock, joint stock companies or otherwise, of each person, company or corporation within each township set down in the column opposite the name of the owners, etc., and the Auditor is required to give a copy of this tax list, called a duplicate, to the County Treasurer.

By Section 2863 the County Auditor is required to make out on or before the first day of October, except in counties having cities of the second grade of the first class, when it shall be on or before the 10th day of November, annually and transmit by mail to the Auditor of State, a complete abstract of the duplicate of his county," and further, "make out and transmit to the Auditor of State an abstract of the number and value of each of the enumerated articles, the value of merchants' and manufacturers' stocks, and the value of all other personal property, moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and the value of all other articles of personal property as returned by the Township Assessors or as fixed by the County Board of Equalization; said duplicates shall be made out in such form and the statements shall contain such details as the Auditor of the State shall prescribe."

By Section 162 of the Statutes of Ohio the Auditor of State is required to make his annual report to the Governor as early as the 15th day of December in each year. That section reads as follows:

"He shall annually, as early as the fifteenth day of December, make and deliver to the Governor a report of the receipts and disbursements of the State Treasury for the year ending on the fifteenth day of the previous November, also of the balances of the several funds then in the Treasury, the amount of warrants drawn on each fund, and which remained outstanding, the unexpended balances of all appropriations, a careful estimate of all ordinary receipts and disbursements for the year ending November fifteenth next following,, and a detailed statement of the public funded and unfunded indebtedness of each county, township, city, village, and school district, with the rate of interest payable thereon, the date of maturity and purpose for which the same was created, and all such other matters as are required by law, or he may deem valuable to State finances as he deemed proper for the consideration of the General Assembly."

It appears from the foregoing provisions of the Statute that all articles of personal property, tangible and intangible, are to be listed and the value fixed to be carried upon the duplicate by the County Auditor and a copy of that duplicate certified to the Auditor of State, which returns the Auditor of States carries into his annual report to

the Governor, and has so done in Ohio from the organization of the State; so that the Auditor's report has become a fixed public record to which all the Courts of the State refer to find any statistical matter carried into the same. We therefore claim that the Supreme Court of Ohio was fully justified in looking into that report to obtain the information derived from it, and that it would be a denial of justice to hold that this Court has not the same means of information as that upon which the State Court founded its judgment.

Opposite counsel also insist that the capital of National Banks and the capital of unincorporated State Banks, by the laws of Ohio, are placed upon an exact equality as respects taxation. At page 58 of their brief they insist that share capital of the corporate banks and net capital of unincorporated banks are the same in value. That this position is wholly untenable is clearly shown from the following facts:

First, that private or unincorporated banks constitute a distinct class by themselves was expressly declared by the Court in *State ex rel vs. Jones, Auditor*, 51 O. S. 492. The Court reviewing the various classes of property, with their modes of taxation, say:

> "The cashier of each incorporated bank returns annually to "the County Auditor the resources and liabilities of the bank, to-"gether with the number of shares held by each stockholder, and "the par value of each share. The County Auditor fixes the total "value of the shares according to their true value in money; * " * * * as in the case of incorporated banks, so the "mode of ascertaining the taxable value of the personal property "of unincorporated banks is alike peculiar to those associations as "belonging *to a distinct class for the purposes of taxation.*"

The sections of the Statute defining a private banker, or bank, and prescribing the mode of valuing its capital for taxation are as follows:

Sec. 2758. Every company, association ,or person, not incorporated under any law of this State, or of the United States, for banking purposes, who shall keep an office or other place of business, and engage in the business of lending money, receiving money on deposit, buying and selling bullion, bills of exchange, notes, bonds, stocks, or other evidences of indebtedness, with a view of profit, shall be deemed a bank, banker or bankers, within the meaning of this chapter.

Sec. 2759. All unincorporated banks and bankers shall annually, between the first and second Mondays of May, make out and return to the Auditor of the proper county, under oath of the owner or principal officer or manager thereof, a statement setting forth:

First. The average amount of notes and bills receivable, discounted or purchased in the course of business, by such unincorporated bank, banker or bankers, and considered good and collectible.

Second. The average amount of accounts receivable.

Third. The average amount of cash and cash items in possession or in transit.

Fourth. The average amount of all kinds of stocks, bonds, including United States Government bonds, or evidences of indebtedness, held as an investment, or in any way representing assets.

Fifth. The amount of real estate at its assessed value.

Sixth. The average amount of all deposits.

Seventh. The average amount of accounts payable, exclusive of current deposit accounts.

Eighth. The average amount of United States Government and other securities that are exempt from taxation.

Ninth. The true value in money of all furniture and other property not otherwise herein enumerated. From the aggregate sum of the first five items above enumerated, the said Auditor shall deduct the aggregate sum of the fifth, sixth, seventh, and such portions of the eighth items as are by law exempt from taxation and the remainder thus obtained added to the amount of item nine, shall be entered on the duplicate of the county in the name of such bank, banker or bankers, and taxes thereon shall be assessed and paid the same as provided for other personal property assessed and taxed in the same city, ward or township."

The constitutional validity of this section was drawn in question in *Treasurer* vs. *Bank*, 47 O. S. 503, but was upheld in its entirety with the exception of the part thereof that permitted the deduction of debts from "cash and cash items," contained in the third sub-division of the section. It was contended in that case that the part of Section 2759 which required that County Auditors in levying taxes yearly upon unincorporated banks and bankers, should deduct the aggregate sum of the fifth, sixth and seventh items of the section, was repugnant to Section three of Article twelve of the Constitution, and was, therefore, void: Ibid 517. But the Court held that "That portion of Section 2759 of the Revised Statutes which directs the Auditor to make the enumerated deductions so far as it includes in the aggregate from which the deductions are to be made, the average amount of "cash and cash items" in possession, is in our view repugnant to the Constitution and void, but is not *otherwise objectionable on* Constitutional grounds."

The State Auditor's report shows that there are private or unincorporated banks in all the eighty-eight counties of the State, except three. It does not, however, show how many such banks there are in each county. Returns, however, received from the various County Auditors throughout the State in answer to a circular letter of inquiry for a statement of the number of private and unincorporated banks in their respective counties show the aggregate number to be 250,—exceeding in number all National Banks, and twice the number of incorporated State Banks, all of which are taxed only on their assets less their debts, or in other words, on their net capital, while incorporated banks are taxed upon the actual value of their shares.

Undoubtedly the indebtedness of a bank is considered in determining the value of the shares, but the question for the Auditor, charged with the duty of assessing the value of the shares at their true value in money, is, in view of the bank's resources and liabilities, the nature and extent of its business, the character of its patrons, the ability with which its affairs are managed, what is the true value in money of the shares. The factor or ingredient of good-will arising from the extent of the banks' business, its clientele, and the ability of its management, materially augmenting the value of the shares, are elements or factors wholly wanting and excluded in fixing the taxable value of the assets of private banks. As respects incorporated banks, this added element of good-will is a very important factor in determining the value of its shares. In many cases the good-will more than doubles the value of the shares. That a tax on the capital of a bank is not the equivalent of a tax on its shares was distinctly held in *Van Allen* vs. *Assessors*, 3 Wall. 573, and reaffirmed in *Bradley* vs. *The People*, 4 Wall. 459, the head note of which latter case is as follows:

"A tax on the capital of a bank is not the same thing as a tax upon the shares of which the capital is composed, and where the State imposes on the State Banks a tax on their capital it cannot lay a tax on the shares of banks organized under the Act of June 3, 1864, providing a national currency." *Van Allen* vs. *Assessors*, 3 Wall. 573 affirmed.

This holding goes to the extent of declaring that the State cannot lay a tax upon any of the shares of the National Bank, where it only imposes a tax on the capital of the State Bank. A tax on the net capital and a tax on shares, being non-equivalents, the condition of the Act of Congress upon compliance with which the power to tax is granted, is not brought into operation: Consequently no power to tax exists. This case is particularly in point, as it is conceded that unincorporated banks of the State are only taxed on their net capital while the Statute of Ohio expressly requires shares of National Banks to be taxed at their true value in money.

In *State ex rel.* vs. *Jones, Auditor, supra,* the Court held that "Private banks were a class by themselves, subjected to a special mode of taxation." If incorporated State Banks were taxed on their capital and not on their shares, there would be no doubt that within the holding of *Bradley* vs. *The People,* National Bank shares could not be taxed, although the capital of such State Banks might be very small in comparison with the capital of National Banks, and much less than the capital of private banks. This was so held in the recent case of *McHenry* vs. *Downer,* 116 Cal. 20; notwithstanding the Statute required the corporate assets and property to be taxed at their full value. The factthat one class is incorporated and the other not, cannot avoid the objection of discrimination. The Act of Congress applies to all moneyed

capital in the hands of individual citizens of the State in any wise brought into competition with National Bank capital, and when it appears that bank capital of either of the two classes of State Banks, is the only property of the bank that is taxed, National Bank shares cannot be taxed within the construction of the Act of Congress settled in *Bradley* vs. *The People,* and followed in *McHenry* vs. *Downer.* What difference can it possibly make with the rights of the shareholders secured to them by the Act of Congress whether the individuals furnishing the bank capital are incorporated or not. The competition is the same with National Banks whether the banking be done by an artificial person, called a corporation, or by the individuals owning the capital who act directly for themselves. Nor does it seem to us that it makes any difference that at a particular period of time an equal amount of money may not be employed in private banking.

Private banks, under the Statute constitute a class with power to increase both in number and capital to any extent, and at present they constitute the largest banking class in the State. Where banking is classified by the Statutes the taxation as authorized must not result in material discrimination, and such discrimination necessarily results when material elements of value are excluded from the assessment of one class that are included in the other.

In *Bradley* vs. *The People,* the Court, in answer to the claim that a tax on the capital was *equivalent to* a tax on the shares as respects the shareholders, said, that that was the position taken by counsel in the case of *Van Allen* vs. *The Assessors,* 3 Wall. 584, and then added:

"Admitting it to be so, yet, inasmuch as the capital of the State Banks *may consist* of the bonds of the United States which were exempt from such taxation, it was not easy to see that the tax on the capital was equivalent to a tax on the shares."

This principle applies to private banks with equal force to that of incorporated banks. The very fact that the capital returned for taxation by private banks is less than the value of the shares of State incorporated banks may largely result from the fact that a large portion of the private banks' funds may be invested in Government bonds. It is sufficient, however, within this authority that the capital of the State Banks *"may consist* of the bonds of the United States."

This was the point of the decision in *Bradley* vs. *The People,* and *Van Allen* vs. *Assessors.* There is another reason equally as valid and persuasive, resulting from the difference between net capital value and share value. Three things enter into the value of shares in all corporate bodies organized for profit; capital, surplus and franchise. The capital, surplus, and good-will of the business make up the value of the shares. This was recently so held in *Adams Express Co.* vs. *Ohio,* 166 U. S. 185.

At page 220, Mr. Justice Brewer, speaking for the Court, of shares of stock, says:

"It is a cardinal rule which should never be forgotten that whatever property is worth for the purposes of income and sale it is also worth for the purpose of taxation."

And further on, page 222,

"The value which property bears in market, the amount for which its stock can be bought and sold, is the real value."

In *Everett's Appeal*, 71 Pa. St. 216, the current market value of shares of stock was held to be their value under a rule requiring property to be taxed at its true value.

In *Pullman Car Co.* vs. *Transportation Co.*, 171 U. S., page 154, Mr. Justice Peckham, speaking for the Court in a case involving the value of the property of a manufacturing corporation, said:

"The market price of the shares of stock * * * * includes more than the mere value of the property owned by it, and whatever is included in that price beyond and outside of the value of its property is a factor which in a case like this cannot be taken into consideration in determining the liability of the cross-defendant." (The liability being for the value of the corporate property). * * * "The value of the franchise for one thing enters into the computation of market value. * * * * The probable prospective capacity for earnings enter largely into market value and future possible earnings again depend to a great extent upon the skill with which the affairs of the company may be managed. These considerations, while they may enhance the value of the shares in the market, yet do not in fact increase the value of the actual property itself."

The judgment of the Court below in this case was reversed on the ground of the erroneous holding that the value of the shares was the value of the corporate property. The judgment finally given in that case representing the value of the corporate property was less than one-third the value of the shares.

In *People* vs. *Coleman*, 126 N. Y. 433, the Court in defining capital stock under the Statute relating to general taxation, say:

"The capital stock of a company is one thing; that of the shareholder is another and a different thing. That of the company is simply its capital existing in money or property or both, while that of the shareholder is representative not merely of that existing and tangible capital, but also of surplus, *of dividend-earning power of franchise* and of the *good-will* of an established and prosperous business."

Considering, in the light of these authorities, the different variant rules prescribed by the Statute for the taxation of investments in private banks and National Banks, resulting in taxing the former on net capital only, while the valuation of National Bank shares is based on the capital and franchise of the bank—the one not being the equivalent

of the other as held in *Bradley* vs. *The People, supra*—we confidently claim that this difference alone establishes a clear violation of the restriction contained in the Act of Congress against invidious taxation of investments in National Bank shares, and a violation so fundamental in character as to prevent entirely the taxation of National Bank shares. The Act of Congress has the same meaning now that it had when the *Van Allen* and *Bradley* cases were decided. If the value of bank shares and the banks' net capital were not the equivalent of each other when these cases were decided they are not now. Lapse of time has not changed the meaning of the Statute, nor rendered the restriction upon the taxation of National Bank shares less binding on the State than when the Statute was enacted.

Again, we understand opposite counsel to claim that inasmuch as the Judge delivering the opinion for the Supreme Court of Ohio, said that the special finding of facts did not show that the legal *bona fide* debts mentioned in the finding were of the class that are authorized to be taken from credits, such declaration is conclusive of this point and that therefore this Court cannot reach the main question involved in the case. There are several decisive answers to this claim. First, the Supreme Court of Ohio itself in the very outset of its opinion say, that the two questions involved, this being one of them, "are federal questions, and can only be finally and authoritatively determined by the Supreme Court of the United States." The interpretation of the finding in connection with the Statutes authorizing deduction considered in the light of the restriction contained in the Act of Congress as respects the shareholders on whose behalf relief is sought, is as much a federal question as the interpretation to be given to the Statute.

Reduced to a simple statement the claim of the Attorney General is, if the Supreme Court of Ohio, construe or interpret the finding of fact contrary to its obvious meaning, the meaning that all parties to the case as well as the Trial Court supposed it to bear, and on which the Trial Court gave judgment, that this Court is to accept that meaning as final. As well might it be claimed that because the Supreme Court of Ohio held, that $111,000,000 of credits was a small and insignificant sum compared with $54,000,000 of other moneyed capital, this Court is to accept that holding as true. If this doctrine is to prevail, rights secured by an Act of Congress would be held by a very brittle thread.

Moreover, the finding follows the language of the petition explicitly, and no objection was taken to its sufficiency of averment. The plaintiff alleged that on the day

"Next preceding the second Monday of April, A. D. 1893, and at the time the cashier of said banking association made return to the Auditor of said county of the names and residences of the shareholders of said association with the numbers and the par value of the shares

of the capital of said banking association for the year 1893, to wit, between the first and second Mondays in May of said year, each of said above named shareholders was indebted and owing to others of legal *bona fide* debts a sum in excess of the credits from which, under the laws of Ohio he was entitled to deduct said debts to an amount equal to the value of said shares, which said excess of said debts over credits as aforesaid the said stockholders above named were entitled to have deducted from the assessed value of said shares so severally owned by them."

This allegation was met by a specific denial and treated throughout the trial as fully meeting the requirements of the Statute if sustained by proof. Having been sustained by proof the finding recited the allegation of the petition. The interpretation given to the finding by the Judge delivering the opinion of the Supreme Court was made without calling the attention of counsel to the point or affording an opportunity to have the finding enlarged by the Trial Court if held to be insufficient to raise the question supposed to be raised by it in the language employed.

Moreover, that the Supreme Court of Ohio did not carry any such interpretation of the finding into the judgment is shown by the syllabus. The question decided by the Court as stated in the syllabus is as follows: "In the administration of our tax laws the holder of National Bank shares has no right under the Statutes, State and National, to deduct his legal *bona fide* debts from the value of such shares, but he is legally bound to pay tax upon the assessed value of such shares without deduction on account of such debts." The only question decided was that under the laws, both State and Natoinal, the owner of shares in a National Bank has no right to deduct his legal *bona fide* debts from their value. That the point stated in the syllabus is the only one decided by the Court is rendered very explicit when rule 6 of that Court is considered. That rule provides that,

"A syllabus of the point decided by the Court in each cause shall be stated in writing by the Judge assigned to deliver the opinion of the Court, which shall be confined *to the points of law arising from the facts* of the cause that have been determined by the Court. And the syllabus shall be submitted to the Judges concurring therein for revisal before publication thereof, and it shall be inserted in the book of reports without alteration, unless by the consent of the Judges concurring therein. 55 O. S. ix."

This rule has been in existence for forty years, and it is perfectly understood by the profession, and all Courts in Ohio, that the law of any case decided by the Supreme Court of Ohio is found in the syllabus and not in the opinion. Undoubtedly, this Court, as held in *Machine Co.* vs. *Skinner*, 139 U. S. 293 ,in determining the ground upon which a judgment in a State Court was rendered will refer to the opinion of

the State Court, but regard must be had to the rule that the Court does not hold itself committed to what is said in the opinion, especially as respects a question not referred to in the syllabus, which contains the law of the case as expounded by the Court. It is a noticeable fact that both the Court and Attorney General use the term "legal bona fide debts" with the same meaning that the Court of Common Pleas, the State Circuit Court and counsel for the Bank and Treasurer all attached to it in the special finding. In the syllabus of the case made up as above stated the term is used precisely as used in the special finding and in the brief of the Attorney General; at page 15 he distinctly says in speaking of obligations for religious purposes, and the like, that for the purpose of making up credits they cannot be classed *as such debts;* so says the Statute; and the Trial Court and counsel in drafting the finding acted on the assumption that such was its meaning.

In discussing at page 30 of their brief the question of discrimination counsel say,

"There can be no discrimination between National Bank shares and credits as defined in the Ohio Statute, unless this Court arrives at the conclusion that moneyed capital as provided in Revised Statutes, Section 5219 U. S., is one and the same thing, or in the same class with "credits," *as defined* in the Ohio Statute, that is, unless it be determined that credits in the Ohio Statute is "moneyed capital." We do not concede that these two species of property are in the same class, but are of the opinion that the argument made at a former place as to the classification is conclusive of this case. * * * * There can be no comparison for the purpose of determining whether there is any discrimination with any other class of species of property under the Ohio Statute, other than what may be properly classed as moneyed capital, which is only *investments in stocks,* or *moneys* invested in the capital, or stock of any association, corporation, joint stock company or other company."

And in the concluding passage of the brief of the Attorney General he states that capital invested in National Bank stock is treated exactly "as capital invested in other 'stocks,'" and consequently the Act of Congress is not violated. The Court took the view that because they were stocks, and treated, as alleged, as other stocks by the Ohio Statute they were not discriminated against. At page 31 the Court say,

"If treated as stocks, as they are, under Court classification, there is no discrimination against them as compared with other stocks and bonds *and the great bulk of our taxable property.*"

It certainly is not difficult, from repeated adjudications of this Court, to establish the fact that taxing National Bank shares as other stocks may be taxed does not meet the condition of the Act of Congress prerequisite to their taxation.

It, however, is not necessary to discuss that question at length, for, not a share of stock in a domestic corporation in Ohio outside of bank shares, and shares of Building and Loan Associations taxed as credits, is taxed in Ohio. In all cases other than these two classes the only tax laid or received is on and from the corporate property taxed to and paid by the corporation, and in which cases, not the slightest account is taken of franchise, good-will, dividend-earning power, or the like. Hence, it is not true that National Bank shares are taxed as other investments in stocks are taxed. They are taxed in entire disregard of the mode of taxation of other corporate property, and at a value augmented over that of other corporate property by an amount equal to the value of the franchise. Aside, however, from this, that moneys invested in credits is "moneyed capital" as that term is used in Section 5219 of the Revised Statutes, has been held in many cases; notably, *Britton* vs. *Bank; Stanley* vs. *Supervisors,* 101 U. S.; *Mercantile Bank* vs. *New York,* 121 U. S., and *Whitbeck, Treasurer,* vs. *Mercantile National Bank,* 127 U. S.

In *Mercantile National Bank* vs. *New York,* 121 U. S. 128, the Court in speaking of the Act of Congress and the meaning of the term "moneyed capital" as used there, said that it included,

"Shares of stock, or *other interests,* owned by individuals in all enterprises in which the capital employed in carrying on its business is money where the object of the business is the making of profits by its use as money."

And in the latter case of *Palmer* vs. *McMahon,* 135 U. S. 667, it was said, speaking of the same term,

"It embraces capital employed in National Banks and capital employed by individuals when the object of their business is the making of profits by the use of their moneyed capital as money."

In *Stanley* vs. *Bank, supra,* the Court did not stop to enquire whether the credits and moneyed obligations in the State of New York, aside from bank capital, were moneyed capital as that term is used in the Act of Congress, but assumed that a sufficient amount of moneyed obligations, not investments in stocks, was exempt from taxation by the New York Statute to cause by such exemption from taxation a conflict with the act of Congress. In Ohio credits embrace the entire moneyed capital of the State outside of bank capital, and capital in building and loan associations and investments in two general classes of bonds, not constituting one-twelfth part of the amount invested in credits actually taxed, and undoubtedly not one-twentieth part of the entire credits of the State, embracing those taxed and those exempt by reasons of deductions actually made therefrom.

Furthermore, the Supreme Court of Ohio treated credits as moneyed capital.

At page 27 of the Record, speaking of the law laid down by this court in the syllabus in *Whitbeck, Treasurer, vs. The Mercantile National Bank,* the Court say: "That holding was right if the Statute of Ohio were as recited, but as clearly shown the Statutes of Ohio do not allow a deduction equal to the *bona fide* debts to be made from the amount of the assessments of the value of moneyed capital in general, but only from a small and comparatively insignificant amount *of moneyed capital, called credits;*"

Deducing the fact that the amount was insignificant by comparing credits, $111,173,728 in amount, not with other moneyed capital, such as investments in bonds, stocks, annuities or otherwise, amounting to only $9,676,374, but with all other taxable property of the State of every kind, amounting to $1,641,817,202. As bearing upon the point, we mention the fact that under the Ohio Statute, Section 3181, all obligations, claims and demands of every kind, expressed or implied, however evidenced, whether in the form of a direct promise, or book account, draw interest from the time they become due. And that by Section 2734, all money loaned no pledge, or mortgage of real estate is a credit. In *Myers* vs. *Seaberger,* 45 O. S. 232, the Court say,

"A loan of money secured by mortgage on real estate is a credit within the meaning of the Statutes of this State providing for the taxation of property."

We mention this fact to make clear, in addition to the point under discussion, the distinction between loans of money secured by mortgage in Ohio and in Kansas.

To remove all doubt that National Bank shares, taxed under Section 2762 of the Revised Statutes at their actual value in money, are not taxed as other stocks are taxed, we direct attention to he Statute making provision for the taxation of other stocks in the State.

Section 2744 of the Revised Statutes of Ohio provides "that the president, secretary and principal accounting officer of every canal or slack water navigation company, turn pike company, plank road company, telegraph company, *or joint stock company,* except banking or other corporations whose taxation is specially provided for, for whatever purpose they may have been created, whether incorporated by any law of this State or not, shall list for taxation, verified by oath of the person so listing, all the personal property which shall be held to include all such real estate as is necessary to the daily operations of the company, moneys and credits of such company or corporation within the State, at the actual value in money."

The corporations whose taxation is specially provided for and consequently withdrawn from the above rule, are railroad, telegraph, telephone and express companies, which are taxed, not on their shares,

but on a ratable division and distribution to the various counties in which they operate or do business, of the portion of their property located in the State. *State ex rel. vs. Jones, Auditor,* 51 O. S. 501. They therefore constitute no exception to the rule for taxing corporate property.

Section 2746 provides:

"Personal property of every description, moneys and credits, investments in bonds, stocks and joint stock companies or otherwise, shall be listed in the name of the person who was the owner thereof on the day preceding the second Monday of April in each year, *but no person shall be required to list for taxation any share or shares of the capital stock of any company the capital stock of which is taxed in the name of such company.*"

"Capital stock," as here used, was held in *Jones* vs. *Davis,* 35 O. S. 474, to mean the property of the corporation. It will thus be seen from these two sections that the great body of corporations of the State are taxed only on their corporate property, while bank shares are taxed at their true value in money, and shares of building and loan associations as credits.

Having shown that under the Statutes of Ohio the great bulk of investments in corporate stocks are not taxed at all except through the partial equivalent of taxing the corporate property, and that the great bulk of other moneyed investments are taxed only on the difference between their value and the debts of the owner, and that private banks are taxed only on net capital, while National Bank shares are taxed at their actual value in money, we respectfully submit the taxing of the latter to be wholly unauthorized and void. If wrong in this claim, we confidently claim that the tax is void to the extent that it embodies in its assessment for taxation an amount equal to the legal *bona fide* indebtedness of the owners of National Bank shares; that *Whitbeck, Treasurer,* vs. *The Mercantile National Bank* was not only well considered and correctly decided, but rests on the firmest foundation, and that its judgment is of controlling authority in the premises.

Respectfully submitted,

W. W. BOYNTON,
Solicitor for Plaintiff.

No. 137.

Brief of Monnett

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Clerk.

BRIEF OF DEFENDANT IN ERROR.

Filed Dec. 19, 1898.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 137.

THE FIRST NATIONAL BANK OF WELLINGTON, OHIO, PLAINTIFF IN ERROR,

vs.

H. P. CHAPMAN, AS TREASURER OF LORAIN COUNTY, OHIO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

(16,630.)

F. S. MONNETT,
Attorney General of Ohio.

S. W. BENNETT,
Of Counsel for Defendant in Error.

In the Supreme Court of the United States.

THE FIRST NATIONAL BANK OF WELLINGTON, OHIO,
Plaintiff in Error.
vs.
H. P. CHAPMAN, AS TREASURER OF LORAIN COUNTY, OHIO,
Defendant in Error.
No. 137.

BRIEF FOR DEFENDANT IN ERROR.

HISTORY OF THE CASE.

The action before the court was originally begun in the Court of Common Pleas of Lorain county, Ohio, by the filing therein on the part of the First National Bank of Wellington a petition for an injunction, the plaintiff praying in its petition that it is a National Banking Association incorporated under the National Banking laws of the United States, and doing business in the village of Wellington in said county and State; that the defendant is the duly elected treasurer of Lorain county, said State; that the capital stock of plaintiff bank is divided into one thousand shares of one hundred dollars each, all of which were averred to be fully paid up and the certificates for the shares outstanding and owned by a large number of persons (names not given); that the cashier of the plaintiff bank reported in duplicate to the auditor of Lorain county the resources and liabilities of said

banking association at the close of business on the Wednesday preceding the second Monday of May, 1893, together with a full statement of the names and residences of the shareholders, with the number of shares held by each and the par value thereof, all as required by Section 2765 of the Revised Statutes of Ohio; that the real estate of said bank was valued at $3,420.00, separately assessed and charged on the tax duplicate of said county; that the auditor of said county, as required by Section 2766 of the Revised Statutes of Ohio, fixed the total value of said one thousand shares at $74,710.00, exclusive of the assessed value of the real estate, and transmitted to the Annual Board of Equalization of incorporated banks a copy of the report so made by said cashier, together with the valuation of the shares as fixed by said auditor; that the said Board for the Equalization of Bank shares acting under Sections 2808 and 2809 of the Revised Statutes of Ohio fixed the value of said shares at $74,710.00, exclusive of the value of the real estate; and further avers that both said auditor and the State Board for the Equalization of Incorporated Banks, did fix and establish a much higher value for taxation upon and for the shares of the capital stock of the plaintiff bank than upon other moneyed capital in the hands of individual citizens of the State by refusing and disallowing any deduction for bona fide indebtedness from the valuation of the shares so fixed for taxation as is allowed to individuals and other citizens of the State on moneyed capital invested in the credits and securities hereafter more particularly defined; that the auditor certified said valuation of $74,710.00 to the auditor of Lorain county, who entered the same upon the tax duplicate of the county for the year 1893, with any deductions disallowed; that in estimating the value of the stock of the plaintiff stockholders the business and franchises of said bank were considered as a large element of value and the value of said shares was largely increased by reason and in consequence thereof, while the shares of stock in nearly all domestic corporations of the State of Ohio are by the statute of the State especially exempted from taxation, the tax required being only levied and placed upon the portion in which the company's capital is invested exclusive of its franchises, thereby creating a discrimination against the shares of plaintiff, because in the estimate of the value of the corporate property of other

corporations their franchises were not included in the estimate of their values for taxation.

Plaintiff further averred that all unincorporated banks and banking companies and private individuals of said State engaged in banking are expressly authorized by the statute of Ohio to deduct their bona fide debts from all legal claims and demands and denied to the shareholders of plaintiff's bank any right of deduction on account of the shareholders' indebtedness.

Plaintiff further averred that the term credits was defined by Section 2730 of the Revised Statutes of Ohio and sets forth in its petition such statutory definition; and averred that a large amount of moneyed capital in the hands of individual citizens of the State and of Lorain county invested in promissory notes and other legal obligations is by Section 2730 allowed a deduction of their bona fide debts to be made therefrom, thereby making an unjust and unlawful discrimination in moneyed capital invested in national bank shares as to which no exemption or deduction is provided for by the laws of the State; and avers that said discrimination is in direct violation of Section 5219 of the Revised Statutes of the United States, and sets forth in his petition the provision contained in said section. Plaintiff then sets forth the names of eight stockholders, giving the number of shares held by each in plaintiff's bank, which the court will find upon examination of the averment to have been 490 shares in the aggregate; out of the total number of shares amounting to 1,000, that said 490 shares were valued by said Board for the Equalization of Incorporated Banks for the year 1893 at $36,607.90, and certified by that board to the auditor of Lorain county as the taxable value of the same. That rate of taxation for the taxes assessed and collected for the year 1893 within said county and village was .0255% on one dollar valuation and amounted on said value of said shares to $933.50.

That on the second Monday of April each of said above named shareholders (eight in number) was indebted and owing to others of legal bona fide debts a sum in excess of the credits from which, under the laws of Ohio, he was entitled to deduct said debts to an amount equal to the value of said shares.

That said stockholders were entitled to have deducted from the value of said shares the excess of said debts over their credits

severally owned by them, proof of which fact shall be duly made to said auditor and the State Board of Equalization, by the shareholders at the time that they respectively fixed the valuation of said shares of stock.

That both the auditor of said county and the State Board of Equalization for Banks refused to allow the deduction of any indebtedness of said stockholders from the value of said shares, and made up and fixed the valuation of said shares in entire disregard of the right of claim of said shareholders to said deduction, and the said auditor has carried upon the duplicate and delivered to the treasurer the entire valuation of said shares so made without allowing and expressly refusing to allow any deduction therefrom by reason of any bona fide indebtedness of said shareholders to others.

The plaintiff further avers that by Section 2839 of the Revised Statutes of Ohio it is declared (here follows a copy of Section 2839 of the Revised Statutes of Ohio).

It is further averred that the defendant threatens in case of non-payment of said taxes to give the notice provided for in said section and thereby prevent the transfer of any of the shares of stock from said stockholders or any other persons to whom they or either of them may have sold them.

Plaintiff further says that if the shares of said stock are permitted to be sold under said lien irreparable injury would be done to each of the shareholders and the defendant would subject it to great loss of standing and credit, for the redress of which the law affords no remedy.

Then follow averments as to what its irreparable injury would consist of, that it would subject it to a great number of suits to adjust the rights of all the parties, the plaintiff would be subjected to great expense.

Plaintiff says that by due authority of law said defendant has endorsed to the plaintiff the collection of certain debts due to said treasurer, its own taxes among them, but under the agreement that it would remit said taxes so collected on December 30th, 1893; that unless enjoined by this court said defendant would demand of the plaintiff on December 30th, 1893, the whole one-half of said taxes so standing on the duplicate against this plaintiff.

Plaintiff then pleads a tender of $485.80, which the defendant refused to receive unless the plaintiff would also pay the taxes on the shares of stock on which said deductions are authorized and required and bring said tender into court for the amount of the taxes lawfully levied on said shares against said plaintiff shareholders and submits and subjects the same to the order of the court; then follows a prayer that the defendant and his successor in office may be enjoined from collecting or attempting to collect from the plaintiff or its individual stockholders any of the said taxes as the same stands charged on the duplicate, that the defendant and his successor in office may be decreed to receive in full of said taxes the sum so tendered by the plaintiff and brought into court, that said injunction may be made perpetual, etc.

To this petition there was an answer filed by the defendant as treasurer of Lorain county, which answer admits that the defendant is the treasurer of Lorain county; that the plaintiff is a National Banking Association; that it has a capital stock of $100,000.00, divided into 1,000 shares of $100 each, all of which are paid up, and that certificates for such shares are outstanding and owned by a large number of persons; that the cashier of the plaintiff made a report of the resources and liabilities of plaintiff as they existed on the Wednesday next preceding the second Monday of May, 1893, together with the names and residences of the shareholders therein, the number of shares each and the par value thereof; admits that the assessed value of the real estate owned by plaintiff was included therein; admits that the auditor of said county, as required by law, fixed the total value of said shares according to the true value in money at $74,710.00, exclusive of the assessed value of said real estate; admits that he transmitted the same to the annual Board of Equalization of Incorporated Banks; that a copy of said cashier's report and the valuation of the shares so fixed by him, admits that said State Board for the Equalization of Banks, acting in accordance with law, did equalize the assessments of said bank and fixed the valuation thereof at $74,710.00, not including the value of the real estate; admits that the Auditor of State did certify said valuation

to the auditor of said county; admits that said auditor did enter the same upon the tax duplicate for the year 1893, disallowing the deductions claimed; admits that the several stockholders named in the petition owned the number of shares respectively as in the petition set forth; admits that said shares were valued for taxation for the year 1893 at $36,607.90; admits that the same was placed upon the tax duplicate of Lorain county at that valuation; admits that the rate of taxation in said village is correctly stated in the petition; that the taxes assessed against said shares is correctly stated and that said Board of Equalization and the Auditor of State refused to allow the deduction claimed by the said shareholders; admits that he placed upon the duplicate the entire valuation of said shares as was so fixed; admits that the several sections of the Statutes of Ohio are so far as cited accurately stated in said petition; admits that plaintiff intends to avail himself of all legal measures provided for the collection of taxes so assessed; and denies each and every other allegation and averment in the petition contained, and prays that the petition may be dismissed and for other proper relief.

On the issues as thus presented by this petition and answer the cause was heard on its merits in the Court of Common Pleas of Lorain county, Ohio, at the May term thereof, 1894, and upon the request of the plaintiff that the court state its conclusion of fact separately from its conclusions of law, the court did make a finding of the facts as shown by the record herein, and also stated its conclusions of law separately therefrom, and found that the plaintiff was not entitled to an injunction as prayed for in the petition, and that the petition should be dismissed, thereupon judgment was rendered upon said finding, according to which judgment and decree the plaintiff excepted.

Thereupon, on August 6th, 1894, the plaintiff bank filed in the Circuit Court of Lorain county, Ohio, its petition in error as set forth in the record herein, alleging two grounds of error relied upon.

First: That the court erred in rendering judgment in favor of the defendant in error on the special finding of facts made in said case.

Second: That the judgment upon said record ought to have been given to the plaintiff instead of to the defendant in error.

Thereupon afterwards at the October term, A. D. 1894, said cause came on to be heard in said Circuit Court of Lorain county, Ohio, upon the petition in error of said plaintiff bank on the papers and pleadings and a duly certified transcript of the orders and judgment of the Court of Common Pleas and *the special findings of fact filed therewith.*

The Circuit Court found there was error manifest upon the face of the record to the prejudice of the plaintiff in error in this, to-wit: That judgment was given for the defendant on said special finding of fact, when the same ought to have been given to the plaintiff.

The judgment of said Circuit Court was that the judgment of the Court of Common Pleas be reversed, and said Circuit Court proceeding to render the judgment which, according to said Circuit Court, the Court of Common Pleas should have rendered, ordered, adjudged and decreed that the said defendant, the treasurer of Lorain county and his successor in office, be perpetually enjoined from in any manner proceeding to collect the taxes described in the petition and asked to be enjoined, or any part thereof, and a special mandate was sent to the Court of Common Pleas to carry said judgment and order for costs into execution.

To this judgment and decree of the Circuit Court of Lorain county, the present defendant in error, acting then as plaintiff in error, prosecuted error in the Supreme Court of Ohio, by filing therein its petition in error.

Said cause was thereupon heard in the Supreme Court of Ohio at the January term, 1897, to-wit: on the 27th day of April, 1897, the judgment of said court being that the judgment of the Circuit Court must be reversed and that of the Court of Common Pleas affirmed. This cause is entitled Chapman, Treasurer of Lorain County, vs. The First National Bank of Wellington, and

is reported in the 56 O. S. Report, pages 310 to 333 inclusive. (See Record, pages 19 to 31 inclusive.)

The Supreme Court of Ohio proceeding to render the judgment that said Circuit Court should have rendered, ordered and adjudged that the judgment of the Circuit Court of Lorain county, Ohio, be reversed, and that the judgment of the Court of Common Pleas of Lorain county be affirmed.

To said judgment of the Supreme Court of Ohio the said First National Bank of Wellington prosecutes error of this court by virtue of Section 709 of the Revised Statutes of the United States.

ARGUMENT.

I. FINDINGS OF FACT CONCLUSIVE.

It will thus be seen from the facts recited as taken from the Record filed herein (See pages 9, 10 and 11 of the Record) that both of the reviewing courts in and for the State of Ohio, viz: The Circuit Court of Lorain county and the Supreme Court of the State, reviewed said cause upon the findings of fact and the conclusions of law as made by the Court of Common Pleas of Lorain county, and disclosed by the record herein and embraced within seven distinct paragraphs, to which reference is above made. The finding of facts was made pursuant to Section 5205 of the Revised Statutes of Ohio, which reads as follows:

"Section 5205. Upon the trial of questions of fact by the court it shall not be necessary for the court to state its findings, except, generally, for the plaintiff or defendant, unless one of the parties request it with the view of excepting to the decision of the court upon the questions of law involved in the trial, in which case the court shall state in writing the conclusions of fact found, separately from the conclusions of law."

We contend that this court can only inquire into the Record that was before the Supreme Court of Ohio, and that the evi-

dence upon which that court acted is wholly embraced within the findings referred to, and that said findings cannot be supplemented with any other or further evidence; and the question before this court must be, "Is the judgment rendered by the Supreme Court of Ohio such a judgment as the facts found require?"

As to the conclusiveness of the finding of facts binding the parties to the record we state the following authorities:

The Supreme Court of Ohio in the case of Ralston vs. Kohls, Administrator, reported in the 30 O. S. Rep., pages 92 to 100 inclusive, the court say on page 99:

"The evidence upon which issues of fact are found, whether by the court or a jury, can be brought upon the record and made a part thereof only by a bill of exceptions."

Again on page 100 the court says: "The plaintiff in error had a right to have the findings of fact made part of the record without any bill of exceptions; but if he desired to raise a question as to whether these findings were warranted by the evidence he could only do so by a bill of exceptions showing the evidence upon which such findings were made, or that they were made without evidence."

In the case at bar, by an examination of the brief of the plaintiff in error, it will be found that fully one-third of the brief is made up of statements of conclusion which are not supported by the findings of fact, and as there was no bill of exceptions embodying all of the evidence taken in this case, there is no way to bring before the court the evidence upon which the facts set forth in the findings were found, therefore the plaintiff in error is limited by the findings of fact and the findings cannot be supplemented by any statement record or found "aliunde" the record.

In the case of Carpenter vs. Warner, 38 O. S., page 416, the Supreme Court of Ohio held:

"Where a court is requested under the statute to find and state the facts and law separately and no objection is made at the time to the sufficiency of the facts found a party cannot avail himself of a defect in the findings in a court of error; but must submit to such judgment as the facts found require."

The courts cite with approval the 31 Cal., p. 591, and The Second Nevada, p. 47.

On page 420 of the same report the court say:

"The contention on behalf of plaintiffs in error in admitting that the judgment debtor did not select this property to hold exempt from levy and sale in lieu of a homestead, for the reason that no execution was issued, and no opportunity was offered him to make the selection and claim the exemption, therefore, the law will presume that he would have made the selection and claimed the exemption if an execution had issued. If such conclusion be regarded as a mere inference of fact, such as a jury or a court, as a trier of facts, might have drawn from the circumstances it cannot avail the plaintiffs in error, as no such fact was found by inference or otherwise."

In the case of Kilgore vs. Emmitt, 33 O. S. Rep., page 410, the Supreme Court of Ohio say:

"Where there are several issues, one of which is made by a demurrer to a reply, and the case is submitted to the court generally, with a request by the defendant for special findings on one of the issues of fact, and the record shows a special finding and judgment on that issue with an exception thereto; also, a general finding and judgment thereon without exception, but it nowhere affirmatively appears what disposition was made of the demurrer; held: In such case in the absence of all showing to the contrary the general findings and judgment will be presumed to include all issues made in the case not specially passed upon."

In the case at bar this court will observe that there is no exception made by the plaintiff bank to the facts as found by the trial court. There is an exception entered by said plaintiff to the court's conclusions of law and an exception to the judgment and decree. Therefore the facts as found by the Court of Common Pleas of Lorain county as shown by the Record were the facts and the only evidence before the Circuit Court and the Supreme Court of Ohio. Hence, we contend, that under the well established rule set forth in Section 709 of the Revised Statutes of the United States, that the jurisdiction of this court on writs of error to said courts is confined to the final judgment or decree in a suit in the highest court in which a decision in the suit could be had—

that the finding of facts can only be resorted to for the purpose of determining the question of law, whether the judgment rendered is such as could be supported by the facts found? And not, that if certain other evidence was introduced, as set forth in the brief of the plaintiff in error, then some other judgment might have resulted therefrom.

Bond vs. Dustin, 112 U. S., 604.

Supervisors vs. Kennicott, 103 U. S., 556.

The presumptions of law are all in favor of the validity of the judgment, likewise, the presumption of law is that the finding of facts are presumed to have been the only facts before the court.

Jones vs. Brown, 11 O. S., 606.

Springer vs. Avondale, 35 O. S., 624.

In the case of Westfall vs. Dungan et. al., found in the 14 O. S. Rep., page 276, the court in the first paragraph of the syllabus says: "The findings of a court or jury on the trial of issues of fact made by the pleadings in an action, are not subject to review on error, except where it appears from the record that a motion for a new trial has been made on the ground that the verdict or finding of the court is against the evidence, and such motion has been overruled."

And on page 279 of the same report, the court say: "The right (of review) is made dependent on the overruling of a motion for a new trial. For in no other way could all the evidence be embodied in a bill of exceptions and legally brought into the record. But in this case no motion for a new trial was made; there was no authority of law for bringing the whole evidence into the record, and we are not authorized to review it."

Citing Kepner's Adm'r vs. Sniveley's Adm'r, 19 O. Rep., 296.

Our only apology for stating the above authorities covering practice in the courts of record in the State of Ohio, is to show that the Supreme Court of Ohio cannot be said to have had any other or further evidence before it than that contained in the findings of fact referred to, and that this court considering this cause on writ of error from the Supreme Court of Ohio will not consider any other or further facts than those set forth in the findings of fact.

No motion for a new trial was made by the plaintiff bank, as shown by the record, hence, the facts as found, has not, and cannot be excepted to; but the sole and only question is as to the questions of law based upon the finding of facts so made, for, as said by the Supreme Court of Ohio, in Jones et. al. vs. Brown, 11 O. S., on page 606, "We are limited strictly to the facts found, and must decide on their legal effect."

"Whenever the judgment of the highest court of a State is brought here for the re-examination of its decision of some federal question, the court must consider the question as it comes from that court."

Melendy vs. Rice, 94 U. S., 796.

"The finding of the court below as to facts is conclusive upon the Supreme Court of the United States."

Norris vs. Jackson, 9 Wall, 127.

Insurance Co. vs. Sea, 21 Wall, 160.

"The court cannot consider the effect of the evidence in the case, but can consider the evidence only to determine whether the facts found are sufficient to support the judgment."

II. THE DECISION OF THE SUPREME COURT OF OHIO.

If our position be maintained in the foregoing proposition as to the conclusiveness of the findings of facts and as to the record presenting but a single question—one of law—viz: Is the judgment rendered such as is supported by the facts found, then we are ready to analyze the position of the Supreme Court of Ohio to discover if error was committed by that court in its conclusion of law from the facts as so found.

In the case of Walter A. Wood Co. vs. Skinner, 139 U. S., 293, this court said: "The opinion of a State court may be referred to to determine the ground on which judgment in the case was rendered."

Referring to that part of the decision of the Supreme Court of Ohio, found on page 25 of the transcript of the Record, the

court, after citing the sections of the Revised Statutes of Ohio governing the question of what constitutes "credits" in Ohio, and what "indebtedness" can be deducted from "credits", say:

"It will be noticed that there is a large class of indebtedness that cannot be deducted from the credits, and to enable the bank to fairly raise the legal question in this case *it should show that the debts sought to be deducted were of the class that our statute allows to be deducted from credits, and that such deductions were generally made by others to an extent that materially affected the said shareholders financially.* A mere theoretical discrimination is not sufficient, it must be actual and material.

The petition avers that a large amount of moneyed capital in the hands of individual citizens of said State and county invested in promissory notes, and other legal obligations, securities, claims and demands is by allowing a deduction of legal bona fide debts to be made therefrom exempted from taxation, but this averment is denied in the answer, and the court does not find it to be true.

So that, for aught that appears in the findings of fact by the court, there was no deduction of debts made from credits, either in the State or county, and the only effort that was made to have such deduction, so far as this record shows, was the effort on the part of these eight shareholders, and *that was unsuccessful.*

The petition avers that 'between the first and second Mondays in May of said year, each of said above named shareholders was indebted and owing to others, of legal bona fide debts, a sum in excess of the credits from which, under the laws of Ohio, he was entitled to deduct said debts to an amount equal to the value of said shares, which said excess of said debts over credits as aforesaid, the said stockholders above named were entitled to have deducted from the assessed value of said shares so severally owned by them, proof of which fact was duly made to said auditor and said State Board of Equalization by the shareholders at the time that they respectively fixed the valuation of said shares of stock.' This averment does not say *that the legal bona fide debts owned by said stockholders and not used as a deduction from credits in making out their tax lists to the assessor*, were not of the class which are not authorized to deduct from the

credits, ***nor that they were of the class which are authorized to be so deducted.*** The averment is denied by the answer, and this put the bank upon its proof. As a result of such proof the court finds that 'between the first and second Mondays of May of said year, each of said above named shareholders was indebted and owing to others of legal bona fide debts a sum in excess of ***the credits***, from which, under the laws of Ohio, he was entitled to deduct said debts to an amount equal to the value of said shares. That proof of said indebtedness was duly made to said auditor by the shareholders aforesaid at the time that the valuation of said shares of stock was so fixed by him, and that said auditor refused to allow the deduction of any indebtedness of said shareholders from the value of said shares, as so fixed by said Board of Equalization.'

While the court finds that there was an excess of indebtedness over credits to an amount equal to the value of said bank shares, it fails to find that such indebtedness was of the character which is authorized under the Statutes ***of Ohio to be deducted from credits.***"

It will thus be noticed by this court that one of the grounds on which the judgment of the Supreme Court of Ohio was based was an entire failure of proof on the part of the plaintiff bank in the following particulars, to-wit:

1. That the debts sought to be deducted were of the class the Ohio Statute permits to be deducted from "credits" as defined by the Ohio Statute.

2. That such deductions were generally made by others to an extent that materially affected the said shareholders financially.

3. That moneyed capital in the hands of individual citizens of said State and county invested in promissory notes and other legal obligations, securities, claims and demands is allowed a deduction of legal bona fide debts therefrom, and thus exempted from taxation.

These were issuable facts. The petition avers them and they were denied by the answer. The plaintiff bank was called upon for proof of the averments in the petition and did not satisfy the court of the existence of the facts averred.

Under the Revised Statutes of Ohio (Section 2730), it is not every class of "debts" that are permitted to be deducted from "credits," in making up the amount of credits "over and above the sum of legal bona fide debts owing by such person."

The following classes of obligations ***are not considered "debts" for purposes of deduction***, viz.:

(1.) Obligations to any mutual insurance company.

(2.) Unpaid subscription to the capital stock of any joint stock company.

(3.) Any subscription for any religious, scientific, literary or charitable purpose.

(4.) Any acknowledgment of any indebtedness unless founded on some consideration at the time received, and believed at the time of making such acknowledgment to be a full consideration therefor.

(5.) Any acknowledgment made for the purpose of diminishing the amount of the credits to be listed for taxation.

(6.) No greater amount or portion of any liability as surety, than the person required to make the statement of such credits believes that such surety is in equity bound, and will be compelled to pay, or to contribute, in case there be no securities.

Here are six distinct classes of debts, that the Ohio Statutes say shall not be taken into account "in making up the sum of such debts."

They may be "legal bona fide debts owing by such person"; ***but for purpose of making up "credits", they cannot be classed as*** such debts. ***They are none the less debts***, but shall not be considered as such, when the excess of credits over debts is to be computed.

Now, for all that the record discloses herein, the "debts" claimed by the plaintiff bank, that it should have been permitted to have deducted, ***are all of the above six prohibited classes.***

In view of the issues and state of the proof herein, was not the Supreme Court of Ohio justified in finding as they did? viz.:

"That this record fails to bring the debts sought to be deducted, within the class which is authorized to be so deducted."

But counsel for the plaintiff bank, in his brief (on page 7) contends that the finding of the trial court (see Record, page 10)

is sufficiently definite from which to discover that the character of debts sought to be deducted was of such kind as was not prohibited by the section of the statute above referred to. The finding referred to, being the latter part of the sixth paragraph in the finding of fact on page 10 of the Record, only characterizes these obligations that were at that time owing by the shareholders named in the petition, as ***legal bona fide*** debts. The debts are not in any other way, or by any other language, described, or more definitely defined as to kind or quality, than by the expression, "***legal bona fide debts.***"

As we have said before, these obligations may be legal bona fide debts owing at the time by the person claiming the deduction; that is, they are existing obligations against him; they are debts in the sense that they are claims against him and against his property; they must be met at some time, and paid; but simply because they are classed in the finding as "legal bona fide debts," that does not find that they are any such debts as the statute permits being deducted in making up the excess of credits over debts. Our answer to that is, first, the answer of the Supreme Court, which passed upon the sufficiency of the findings of fact, and rendered such judgment as it thought the facts would support.

We quote from page 26 of the Record: "While the court finds that there was an excess of indebtedness over credits, and an amount equal to the value of said bank shares, *it fails to find that such indebtedness was of the character which is authorized under the Statutes of Ohio to be deducted from the credits.*

"*This court cannot presume in the face of the record* * * * *that the said debts of the said stockholders were of the class authorized to be deducted from the credits under our practice, the presumption is that the court found all the facts which the proof warranted, and facts not found by the court are presumed not to exist.*"

Citing: Jones vs. Brown, 11 O. S., 606.
Springer vs. Avondale, 35 O. S., 624.

"It is therefore clear, that this record fails to bring the debts sought to be deducted, within the class which is authorized to be so deducted."

The conclusion arrived at by said court seems to us to have been irresistible, and the only one which the facts would warrant. But in the case of the First National Bank of Garnett vs. Ayres, found in Volume 160 U. S. Reports, page 660, we think the court has passed upon this question and sustained the view that we take of it. That case, like the case at bar, was heard upon a finding of facts, and in that finding of facts was embodied the following language:

"*On the day last named certain stockholders, named in the statement, were justly indebted and owed in good faith the several sums of money set opposite their respective names in plaintiff's petition. These debts were not owing to any person, bank or corporation as depositors in banks or banking associations, or any person or firm engaged in the business of banking in Kansas or elsewhere, nor were they debts owing on account of any of the things named in the Kansas Statute hereinafter alluded to.*"

Turning to that part of Section 6847 of the general Statutes of Kansas defining what debts may be deducted from credits, we find the following language: "Debts owing in good faith by any person, company or corporation may be deducted from the gross amount of credits belonging to said person, company or corporation. Provided, such debts are not owing to any person, company or corporation as depositors in any bank or banking association, or with any person or firm engaged in the business of banking in this State or elsewhere; and the person, company or corporation making out the statement of personal property to be given to the assessor, claiming deductions herein provided for, shall set forth both the amount and nature of the credits, and the amount and nature of his debts sought to be deducted; but no person, company or corporation shall be entitled to any deduction on account of any bond, note or obligation given to any mutual insurance company, or deferred payment, or loan for a policy of life insurance, nor on account of any unpaid subscription to any religious, literary, scientific or benevolent institution or society."

In that finding the court will note that it was distinctly found "that the debts were not owing to any person, company or corporation as depositors in any bank or banking association or any person or firm engaged in the business of banking in Kansas, or elsewhere; *nor were they debts owing on account of any of the things named in the Kansas Statute herein alluded to.*"

If the finding in the case at bar had been made in the same way that the finding was in the Ayers case, or if counsel had seen to it that it was made so as to support the contention they now make, it would have read: "The debts were not obligations to any mutual insurance company; nor unpaid subscriptions to the capital stock of any joint stock association; nor any subscription for any religious, scientific, literary or charitable purpose; nor in acknowledgment of any indebtedness unless founded on some consideration at the time received, and believed at the time of making such acknowledgment to be made for the purpose of diminishing the amount of the credits to be listed for taxation; nor did they embrace any greater amount or proportion of any liability as surety, than the person required to make the statement of such credits believed that he is in equity bound, and will be compelled to pay; nor are they such debts "as are prohibited by the statute from being deducted from credits."

There could have been no exception to any such finding, if made; but the Supreme Court of Ohio is not called upon to supply the missing evidence; nor to infer a state of facts as proven, which in fact was not proven; nor should this court travel outside of the case to do for the plaintiff in error what it failed to do for itself.

The decision, as contained in the Record, shows further that there was a failure of proof, as hereinbefore recited, regarding the claim made by the plaintiff in error that deductions were generally made by others to an extent that materially affected the said shareholders financially; and also a failure of proof regarding moneyed capital in the hands of individual citizens being allowed a deduction of certain bona fide debts therefrom.

We consider that all of these reasons as given by the Supreme Court of Ohio, for finding against the plaintiff in error,

are fundamental and material, and has been thoroughly settled in the Ayres case referred to.

The syllabus of that case is as follows:

"The single fact that the Statutes of Kansas, regulating the assessment and taxation of shares of national banks, *permit some debts to be deducted from some moneyed capital, but not from that which is invested in the shares of national banks*, is not sufficient to show that the amount of moneyed capital in the State of Kansas from which debts may be deducted, as compared with the moneyed capital invested in shares of national banks, is so large and substantial as to amount to an illegal discrimination against national bank shareholders in violation of the provisions of the Revised Statutes, Section 5219."

In that case, as in the case at bar, this court was asked to take judicial cognizance of what was claimed to be facts, but not embraced within the finding of facts. On page ten of the brief of plaintiff in error the court is asked to take judicial notice of certain things, such for instance as is found on pages 12, 13 and 14, and the financial statements made on pages 32, 33 and 34 of the brief of the plaintiff in error.

Upon this subject the court said in the Ayres case, quoting from page 667: "From the record in this case it is wholly impossible to determine that there is any discrimination against the holders of national bank stock. *In order to come to a decision in favor of the plaintiff in error it would be necessary for this court to take, what council for plaintiff calls judicial notice, of what is claimed to be a fact*, viz.: That the amount of moneyed capital in the State of Kansas from which debts may be deducted as compared with the moneyed capital invested in shares of national banks, was so large and substantial as to amount to an illegal discrimination against national bank shareholders. *This we cannot do, for there is no proof whatever upon the subject. The State court has thus determined from its own knowledge that the credits from which debts may be deducted do not constitute a large or even material part of the moneyed capital of the State*, but on the contrary that court says that debts secured

by liens on real estate, money invested in corporate stocks of all kinds and descriptions, including railroad, banking, insurance, loan and trust companies and also the multifarious forms of moneyed securities, moneys on deposit subject to call, and other forms of invested capital, constitute the great bulk of the moneyed capital in that State, and from all such moneyed capital no deduction for debts is allowed. As the record appears there is no fact of which the court can take judicial notice. The relative proportions in which the moneyed capital in the State of Kansas is invested in the various kinds of securities to be therein found this court cannot judicially know. When proof shall be made regarding that matter, it may then be determined intelligently whether, within the case of the Mercantile Bank, Supra, there has been a real discrimination against the holders of national bank shares, and hence a violation of the above cited act of congress. *The single fact that the Statute of Kansas permits some debts to be deducted from some moneyed capital, but not from that which is invested in the shares of national banks, is not sufficient to show such violation.*"

All of the above quotation is applicable to the case at bar; and as the court in that case refused to take judicial notice of the facts requested of it, so we can find no reason why the court should distinguish the case at bar from the Ayres case, and take judicial notice of the matter recited in counsel's brief for the plaintiff in error, when those matters are not embraced within the findings of fact.

III. JUDICIAL NOTICE.

In addition to the case of Ayres vs. Bank, 160 U. S., 667, we cite the court to the following authorities, holding that this court will not judicially notice the facts as requested by counsel: In the case of R. R. Co. vs. Hoffhines, 46 O. S., found on page 650, the Supreme Court of Ohio passed upon this question with regard to a co-ordinate branch of the administrative department of the government. In that case it was shown that the Commis-

sioner of Railroads of the State of Ohio was required by the statute to report annually to the Governor of the State as provided by Section 63 and Section 264 of the Revised Statutes of Ohio. The report of the Auditor of State is of no higher order than that of the Commissioner of Railroads, yet the court held against the proposition in the following language:

"It is not insisted that there is any allegation, proof, or admission of this claim. Reference is made to the several acts, which show the incorporation of the roads as stated. To sustain the statement that the subscriptions were paid, and hence that the corporate name became changed at once to the Marietta & Cincinnati Railroad Company, *counsel cite the report of the Commissioner of Railroads for the year 1870, wherein it is stated that the subscriptions were made in conformity with the statute and the name of the company changed* to that of the Marietta & Cincinnati Railroad Company. *The court is thus asked to take judicial notice, not only of the acts referred to, but of the statement contained in the reports. If this can be done the claim is sustained; if it cannot, the claim fails, and there is nothing before the court to show when, or under what law, the Marietta & Cincinnati Railroad Company was organized.* There is apparent conflict of decision in this State as to what law will be judicially noticed, and there is at least doubt whether the act of March 21st, 1851, can be so noticed. The holding in Brown vs. The State, 11 Ohio, 277, is authority to the effect that such a law can be noticed, while the decision in Railway Company vs. Moore, 33 O. S., 384, is to the contrary. We will not here attempt to reconcile these cases. But it may be said of the earlier acts, that, although it is in the form of a special law, and classed among the local laws in the yearly volume, yet it is of a public rather than private nature, inasmuch as it contains grants of sovereignty interesting as well the community whose rights are thereby contracted, or the corporators whose rights are thereby enlarged. And assuming, without holding, that both acts referred to may be judicially noticed, there still remains the question whether the *contents of the commissioners' report can be so treated.* There are certain executive documents, such as official proclamations,

treaties with foreign powers, and other public documents, issued by the executive or legislature, which courts will notice judicially, ***but an examination of an extended line of authority fails to disclose a single holding to the effect that documents similar to that of a commissioner's report may be classed among those of which judicial notice will be taken.*** Nor can the claim be sustained upon reason. In general, courts will judicially notice only such facts, or conclusions from facts, as are not the proper objects of evidence. Such are styled "***nonevidential.***" Wharton on Evidence, Vol. 1, Sec. 277. It cannot be said that the court, from its presumptive knowledge of the law, or of public events, would have within judicial cognizance, the statement of the Commissioner of Railroads as to an antecedent fact. The question whether or not the statute of March 21st, 1851, had been complied with, could have been put in issue in the pleadings. It would then have been a proper subject of evidence, and could have established or disproved by any witness having knowledge of the fact. This could not be true as to matters which the court may judicially notice."

We also cite Hanley et. al. vs. Donoghue, 116 U. S., p.1. Also refer the court to the authorities cited in Renad vs. Abbott, 116 U. S., 277.

IV. CONSTRUCTION OF THE TERMS "INVESTMENTS IN STOCKS," "CREDITS" AND "MONEYED CAPITAL."

It is a conceded proposition, that the legislatures of the several states derive their right to tax bank shares in national banks from the grant of power made by congress to the states as contained in Section 5219, Revised Statutes of the United States. The power to tax such shares is subject to but two restrictions, viz.:

(1.) "That the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State.

(2.) "And that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere."

"The right to tax such shares exists, *and the manner of imposing the tax* is for each State to determine for itself, subject only to the two restrictions cited."

Richards vs. Rock Rapids, 31 F. R., 508.

Subject to these two restrictions, the State's right to tax national bank shares is as unlimited as to any other property.

It follows, therefore, from the power vested in the several states, that the legislatures thereof have the right to provide for the classification of bank shares, for purposes of taxation, among the varied forms of property mentioned in the statutes, upon which taxes shall be levied by State authority, *keeping in view the restriction aforesaid;* and also that such classifications be with property similar in character to that of the shares so listed. Such classification is a subject of State legislation.

"It was deemed consistent * * * with these national uses, and otherwise expedient, *to grant to the states* the authority to tax them (the bank shares) within the limits of the rule prescribed by the law. In fixing those limits it became necessary to prohibit the states from imposing such a burden as would prevent the capital of individuals from freely seeking investments in institutions which it was the express object of the law to establish and promote."

Mercantile Bank vs. New York, 121 U. S., 154.

Bank vs. Boston, 125 U. S., 60.

"The statutory provisions, whereby different classes of property are listed and valued for taxation in and by different modes and agencies, are not necessarily in conflict with the provisions of the constitution which require all property to be taxed by a uniform rule, and according to its true value in money."

Wagoner vs. Loomis, 37 O. S., 571.

As different classifications must necessarily be made of all property and each class defined, so that it may be made to bear its equal share of taxes with all other classes, so also *different modes and agencies* must be employed for listing, valuing and equalizing different kinds of property, and these modes and

agencies, may be, and sometimes are not the same as those employed for the like as to other property. To this no objection can be made.

It is then, not the *use* of the various classifications, or various modes and agencies employed, that can be complained of, but *the abuse* of such means—and the *abuse*, defined by Section 5219, Revised Statutes U. S., of which complaint may be made, if at all, is in assessing upon shares in national banks, a greater rate than is assessed upon other "moneyed capital" in the hands of individual citizens. As different modes of listing, valuing and equalizing the same were necessary to attain the object of equal and impartial taxation, the legislature of Ohio passed Section 2730, Revised Statutes, creating "classes" of property, and also defining what property should be included in each class. (See analysis of said section on page 15 of this brief.)

Among other "classes" thus created was, one styled "Investments in Stocks," which was defined to mean and include,

"All moneys invested in the capital or stock of any *association*, corporation, joint stock company, or other company, the capital or stock of which is or may be divided into shares, which are transferrable by each owner without the consent of the other partners or stockholders, for the taxation of which no special provision is made by law, held by persons residing in this State, either for themselves or others."

Another class created by the same statute was styled "credits", which was defined to mean:

"The excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or service due or to become due to the person liable to pay taxes thereon, including deposits in banks or with persons in or out of this State, other than such as are held to be money (as hereinbefore defined), when added together (estimating every such claim or demand at its true value in money), *over and above the sum of legal bona fide* debts owing by such person; but in making up the sum of such debts owing there shall not be taken into account (then follows six different classes of obligations that cannot be deducted from "credits", as above defined)."

It will then be seen, that, by the above, it is only certain

kinds of personal property included in the term "credits", and only certain kinds of bona fide debts that can be deducted from "credits", thus defined. Deductions cannot be made of debts of any kind from any other class than "credits."

In the consideration of this case by the Supreme Court of Ohio, that court was called upon to determine, to what class under Section 2730, Revised Statutes, bank shares should be assigned. That court determined that bank shares should be classed as "investments in stocks" as above defined, and not as "credits." And being held to be stocks, the legal bona fide debts of the owner of such shares could not be deducted from their assessed value. In thus assigning national bank shares to the statutory class known as "stocks", the limitation placed upon the State's right to tax was born in mind, to-wit: "That taxation shall not be at a greater rate than is assessed upon other *moneyed capital*, etc."

Bank shares are only permitted to be exempt from taxation to the degree that other "moneyed capital" is exempted by the statute.

This brings us to the construction of the term "moneyed capital" as employed in Section 5219, Revised Statutes U. S., by this court; and a comparison of that definition with the statutory definition of "Investments in Stocks," and "credits." Bank shares being "moneyed capital," if "moneyed capital," as defined by this court, is in reality identical, or substantially so, with "investments in stocks," as defined by Section 2730, Revised Statutes of Ohio, then it follows, that the same treatment accorded "investments in stocks," by the taxing officers in Ohio, should be accorded "moneyed capital"; and if that has been done, and no appreciable discrimination is made in favor of stocks, and against "moneyed capital," then the restriction contained in Section 5219, Revised Statutes of United States, has not been violated.

DEFINITIONS OF MONEYED CAPITAL.

"Moneyed capital" as used in Revised Statutes, Section 5219, forbidding a State to tax shares of stock in national banks at a greater rate than is assessed upon other "moneyed capital" in

the hands of individual citizens of the State, embraces capital employed in national banks, and capital employed by individuals when the object of their business is the making of profit by the use of their moneyed capital as money."

Anderson's Law Dictionary, page 684.

Justice Matthews in Bank vs. Boston, 125 U. S., on page 68, in making a comparison "of national bank shares with that of insurance companies, and trust companies, The American Bell Telephone Company and the Mass. Hosp. Life Ins. Co.," says that: "Within the definition of that phrase (moneyed capital) established in the case of the Mercantile Bank vs. New York, 121 U. S., 138, the interest of individuals in these institutions is not moneyed capital."

"*The investments made by the institutions themselves*, constituting their assets, are not moneyed capital in the hands of individual citizens of the State."

People vs. The Commissioners, 4 Wall, 244.

In the case of the Mercantile Bank vs. New York, 121 U. S., on page 153, the court say in commenting upon Van Allen vs. The Assessor, 3 Wallace, 537:

"It follows as a deduction from this decision that "moneyed capital in the hands of individual citizens" does not necessarily embrace shares of stock held by them in *all* corporations whose capital is employed, according to their respective corporate powers and privileges, in business carried on for the pecuniary profit of the shareholders, although shares in some corporations, according to the nature of their business may be such "moneyed capital."

"The rule and test of this difference is not to be found in that quality attached to shares of stock in corporate bodies generally whereby the certificates of ownership have a certain appearance of negotiability, so as easily to be transferred by delivery under blank power of attorney, and to be dealt in by sales at the stock exchange, or used as collaterals for loans, as though they were negotiable security for money. This quality in a greater or less degree, pertains to all stocks in corporate bodies, the facility of

their use in this way being in proportion to the estimated wealth and credit, present and prospective, of the corporation itself."

And on page 154 the court say:

"The true test of the distinction, therefore, can only be found in the nature of the business in which the corporation is engaged. The key to the proper interpretation of the act of congress is its policy and purpose."

The court then proceeded to state the policy of congress in enacting said law; that it was to encourage the establishment and maintenance for such associations for the purpose of providing a uniform system of currency. And in order to prohibit the states from imposing burdens upon capital invested therein, and thus cause it to flow in other channels for investments such restrictions were enacted.

The court concludes by holding that "moneyed capital" is capital employed in carrying on business in enterprises whose capital is money and where the object of the business is the making of profit by its use as money.

In Evansville Bank vs. Britton, 105 U. S., 322, the court say: "The act of congress does not make the tax on personal property the measure of the tax on bank shares in the State, but the tax on moneyed capital in the hands of individual citizens, credits, money loaned at interest and demands against persons or corporations are more purely representative of moneyed capital than personal property, so far as they can be said to differ."

In Palmer vs. McMahon, 133 U. S., 667, the court define "moneyed capital" as follows: "The term moneyed capital is used in the Revised Statutes, Section 5219, respecting State taxation of shares of national banks, embrace capital employed in national banks, and capital employed by individuals when the object of their business is the making of profit by the use of their 'moneyed capital' as money, as in banking, as that business is defined in the opinion of the court."

In the case of the People vs. Commissioners, 71 U. S., 257, the Supreme Court held, that: "Insurance companies are not within the contemplation of the act of congress as contained in Section 5219, hence investments in insurance companies are not 'moneyed capital.'"

In the case of Hepburn vs. The School Trustees, 23 Wallace, 483, the Supreme Court say: "It is contended that the term 'moneyed capital' as here used signifies money put out at interest. * * * We cannot concede that money at interest is the only 'moneyed capital' included in that term as here used by congress. The words are 'other moneyed capital,' that certainly makes stocks in these banks moneyed capital, and would seem to indicate that other investments in stocks and securities be included in that descriptive term."

It will be noticed that in the case last above cited that this court in defining "moneyed capital" has used the same expression as used in Section 2730 of the Revised Statutes of Ohio, viz.: Holds it to be "investments in stocks." We conclude from the above holdings of this court that the term "moneyed capital" can be truly defined moneys invested in banking associations and such corporations or companies or kindred organizations, whose business is the making of profit by the use of their "moneyed capital" as money.

We contend that the construction given to this term "moneyed capital" by this court, is similar to that construction given to the term "investments in stocks" by the legislature of Ohio and by the holdings of its Supreme Court, and to no other classification under Section 2730 of the Revised Statutes of Ohio could the term "moneyed capital" be so properly applied as to that class embraced within that statute known as "stocks" or "investments in stocks."

It will be observed how closely the language of Section 2730 above cited follows that of Section 2, Article 12, of the Constitution of that State; and also in giving the statutory classification. It will be observed that the legislature has but followed that classification contained in that part of the fundamental law embraced within Section 2 of Article 12, as follows: "Laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise; and also all real and personal property according to its true value in money, etc."

This provision of the Constitution clearly recognizes "money" as one class of property, "credits" as another class,

"investments" as another class, and "investments in stocks" still another class, and so on, and this distinction has been kept up through all the statutes which have been passed under this section of the Constitution.

On the 13th day of April, 1852, the legislature of Ohio passed a tax law, which is found on page 135 of the laws of 1852, and also on page 901 of Swan's Statutes of 1854, and in which the 10th section provided that in making up the amount of "moneys and credits" a person might deduct from the gross amount of "moneys and credits" the amount of his bona fide debts, etc.

This Section 10 of the statute was declared unconstitutional by the Supreme Court of Ohio in the case of the Exchange Bank of Columbus vs. Hines, 3 O. S., page 1. The syllabus is as follows: "The 10th Section of the law which allows individuals and certain corporations in giving their tax list to deduct their liabilities from the amount of their moneys and credits is repugnant to the Constitution of Ohio and is void."

"The constitution permits no deduction of liabilities from moneys and credits."

In the case of Latimer vs. Morgan, 6 O. S., page 280, this decision was approved and followed. The Supreme Court in that case said: "The decision in the case of the Exchange Bank of Columbus vs. Hines. 3 O. S., page 1, giving a construction to the 2d and 3d Sections of the 12th Article of the Constitution, and declaring unconstitutional and void the 10th Section of the tax law of April 13, 1852, approved and followed."

That section of the tax law above referred to being inorperative by reason of the decision in Bank vs. Hines, and Latimer vs. Morgan, Supra., the legislature passed an act on the 1st day of April, 1856, Section 5, which act is found on page 52 of Volume 53 of the Ohio laws, and there defines what "credits" are, and what obligations may be excepted from taxation by deduction from the credits as there defined; but the court will observe that the deduction was not to be made from "moneys and credits", but from "credits" alone, and those only of a certain class; also that the debts to be deducted are of a certain class and do not include debts generally.

This plainly raises a different question than the one that was presented in the case of Bank vs. Hines and Lattimer vs. Morgan, Supra., and the Supreme Court in passing upon this amendatory act in the case of Payne vs. Watterson, 37 O. S., page 121, said:

"Under Title 13 of the Revised Statutes relating to taxation, a person required to list property is not authorized to deduct his debts from his investments in bonds as therein defined and to return the excess only for taxation."

That case presented the question whether debts could be deducted from "investments in bonds" of certain corporations then held and owned by the plaintiff in error. In passing upon that question the court decided that:

"Investments in bonds" were not "credits and therefore the deduction on account of debts could not be made from "investments in bonds," and they again affirm the decision in the case of Bank vs. Hines.

This statute of April 1st, 1856, defining the meaning of the word "credits" was re-enacted in substantially the same words in 1859, page 173, Section 1; also in 1875, page 437; and again in 1876, page 29, and now forms Section 2730 of the Revised Statutes of Ohio.

V. IS THERE SUCH DISCRIMINATION SHOWN BY THE RECORD IN THIS CASE AS COMES WITHIN THE LIMITATION PRESCRIBED BY SECTION 5219, R. S. U. S.

The manner of taxing shares of national banks is left by congress to the State legislature, subject to the restriction "*that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State.*" *R. S. U. S., 5219.*

There can be no discrimination between national bank shares and credits as defined in the Ohio Statute, unless this court arrives at the conclusion that *moneyed capital* as provided in R. S., Sec. 5219, U. S., is one and the same thing, or in the same

class with "*credits*" as defined in the Ohio Statute, that is, unless it be determined that "credits" in the Ohio Statute is "moneyed capital."

We do not concede for a moment that these two species of property are in the same class, but are of the opinion that the argument made at a former place as to the classification is conclusive of this case. That is, as the only limitation placed upon the taxing power of the State is, that there shall be no discrimination between national bank shares and other moneyed capital, there can be no comparison for the purpose of determining whether there is any discrimination with any other class or species of property under the Ohio Statute, other than what may be properly classed as moneyed capital, which is only "*investments in stocks*," or *moneys* invested in the capital or stock of any association, corporation, joint stock company, or other company.

The burden of the claim of counsel for plaintiff in error, is, that merely because the law of Ohio does not permit or allow exemption from taxation of national bank shares by deduction of the debts of the owner from the value thereof, while it does allow such exemption or deduction of debts from credits, that "*ipso facto*," there is discrimination and that the statement in the petition, "that a large amount of moneyed capital in the hands of individual citizens of the State invested in promissory notes and other legal obligations, securities, claims and demands, are exempt from taxation by the allowance of the deduction of legal bona fide debts therefrom," is not an allegation which states a fact requiring any proof for its establishment other than a simple reading of the statute. That if evidence is required, none having been offered, the reviewing court will take judicial notice of such facts, as counsel have stated in his brief, which tend to show the discrimination for which he contends.

Reviewing courts do not upon error take judicial notice of facts. Courts when exercising original jurisdiction only avail themselves of this rule, and when they do judicially notice facts, the court, when necessary to support the finding it makes, must find the facts which it judicially notices and upon this the reviewing court will pass its judgment.

The plaintiff in error relies upon the case of Whitbeck vs. Mercantile Bank, 127 U. S., 193, in support of this contention just referred to.

This case and the one at bar are clearly distinguishable; and the Whitbeck case is clearly to be distinguished from certain other cases decided by this court cited as enunciating principles governing this case.

In the Whitbeck case, the question was that bank shares were taxed at a greater rate, per cent., than other moneyed capital all over the State. It was claimed in that case that there was no evidence presented that there was any discrimination against bank shares. The court, meeting that objection, Justice Miller speaking, said:

"There is evidence that the rule which was adopted by the Board of Equalization of Cuyahoga county of fixing the assessment at sixty per centum of the cash value of the property, prevailed in eleven other counties in the State. It is also a fact that in regard to those counties the discrimination against the national banks, as compared with other moneyed capital, is established."

So that to make the finding in that case, the court had evidence before it, and this court in pronouncing its judgment looked to the record before it, and not outside of it.

The Whitbeck case and the one at bar are further to be distinguished in this particular.

The allegations in the Whitbeck case were that upon the assessment of its value of shares of its capital stock for the purpose of taxation, they were estimated at sixty-five cents on the dollar of their real value in money. *While all the personal properiy in the city of Cleveland and county of Cuyahoga, including moneyed capital in the hands of individual citizens of said city and county, was estimated at only sixty cents upon the same basis.*

That was a discrimination in the rate or method of fixing values, by a comparison of fixing all values, which included among all other property the two classes mentioned in Section 5219, viz., bank shares and moneyed capital. The method of comparison provided by Ohio law, or rather as actually adopted by the taxing officers was challenged.

While in the case at bar the allegation of the complaint challenges the right of Ohio law to extend an exemption to one class of property, under which bank shares do not in fact fall, but under whose protection they seek shelter, in the following allegation:

"Between the first and second Mondays in May of said year, each of said above named shareholders was indebted and owing to others of legal bona fide debts, a sum in excess of the credits from which, under the laws of Ohio, he was entitled to deduct said debts to an amount equal to the value of said shares, which said excess of said debts over credits as aforesaid, the said stockholders above named were entitled to have deducted from the assessed value of said shares so severally owned by them, etc."

* * *

"That both the auditor of said county and the State Board of Equalization for Banks, refused to allow the deduction of any indebtedness of said stockholders from the value of said shares, and made up and fixed the valuation of said shares in entire disregard of the right or claim of said shareholders to said deduction."

Thus it will readily be seen upon the allegations and facts proven in the Whitbeck case and in the one at bar, that they are not under the same class, but that this class comes under another class of cases decided by this court, relating to discrimination by exemption, notably,

Bank vs. Ayres, 160 U. S., 661.

This court and other federal courts have very clearly laid down the rules for the determination of the question whether or not there has been any discrimination in taxing bank shares and other moneyed capital, within the limit prescribed by R. S. 5219, U. S.

In the first place the court has always had in mind the first principle underlying taxation, that exact equality and uniformity cannot be accomplished by law, and in determining whether the proceedings under the different taxing methods fall within the limitation prescribed by congress, the court has uniformly recognized this principle.

Boyer vs. Boyer, 113 U. S., 691.

The policy of the act of congress was to foster the national banking system by protecting national banks as against state banks.

The changed condition of the banking interests was the occasion for a change so that the restriction was that taxation shall not be at a greater rate than other moneyed capital.

Lionberger vs. Rouse, 9 Wall, 474.

Justice Peckham in Bank vs. Ayres, 160 U. S., 664, said:

"In the Mercantile Bank vs. New York, 121 U. S., 138, it was held that the main purpose of congress in fixing limits to taxation on investments in shares of national banks was to render it impossible for a State in levying such a tax to create and foster an unequal and unfriendly competition by favoring State institutions and investments of a like character. Mr. Justice Mathews, in delivering the opinion of the court in the above cited case, gave an exhaustive review of the cases which had been decided in this court up to that time, under this section of the United States Statutes, and it is evident from the opinion and decision of the court in that case that the intent of the United States Statute was to prevent an unjust discrimination against moneyed capital invested in shares of national banks by rendering it impossible for the State in levying a tax on such shares to create and foster an unequal and unfriendly competition by favoring institutions or individuals carrying on a similar business and operations and investments of a like character."

Whether or not this discrimination between bank shares and other moneyed capital actually exists is a fact which must be shown and found. This is argued at another place, but here it will be said that the claim of the plaintiff in error stated at the beginning of this subject, that the court will look to the law without proof, and determine, or if proof is necessary, judicial notice will be taken of what is claimed as a fact, has been decided adversely by this court in Bank vs. Ayres, 160 U. S., 660.

The rule adopted by this court as to when a discrimination will be within Section 5219, R. S., is that it must be "so large and substantial as to amount to an illegal discrimination against national bank shareholders."

That: "The single fact that the statutes * * * regulating the assessment and taxation of shares in national banks permit *some* debts to be deducted from *some* moneyed capital, but not from that which is invested in the shares of national banks, is not sufficient to show that the amount of moneyed capital in the State * * * from which debts may be deducted, as compared with the moneyed capital invested in shares of national banks, is so large and substantial as to amount to an illegal discrimination against national bank shareholders, in violation of the provisions of Revised Statutes, Sec. 5219."

Bank vs. Ayres, 160 U. S., 660.

"As the act of congress does not fix a definite limit as to percentage of value, beyond which the states may not tax national bank shares, cases will arise in which it will be difficult to determine whether the exemption of a particular part of moneyed capital in individual hands is so serious or material as to infringe the rule of substantial equality."

Boyer vs. Boyer, 113 U. S., 702.

"As the law now is, the right of the State to tax the shares in national banks is not dependent upon the question whether shares in State or savings banks are taxed. The right to tax such shares exists, and the manner of imposing the tax is for each State to determine for itself, subject only to the two restrictions above cited. It is not, therefore, sufficient, as is assumed in argument, to show merely that the State laws provide a different mode or manner of taxing moneyed capital invested in savings banks or other corporations from that applied to the taxation of money invested in national banks. Before the assessment of the shares in national banks can be held invalid and void, it must be shown there is in fact a higher burden of taxation imposed upon the money thus invested than is imposed upon the moneyed capital."

Richards vs. Rock Rapids, 31 F., 505.

The cases in which it has been held that there have been discriminations, are cases where the mode of assessment has been different than in the case at bar, and where the comparison was made with all other classes of property, while the Ohio law

only allows an exemption from a portion of personal property, viz., credits.

In Supervisors vs. Stanley, 105 U. S., 305, the laws of New York allowed the owner of *all other personal taxable* property to deduct debts while the same privilege was not extended to national bank shares.

To same effect is People vs. Weaver, 100 U. S., 539.

"Necessarily there may be other moneyed capital in the locality than as is exempt. If there is, moneyed capital, as such, is not exempt. Some part of it only is. It could not have been the intention of congress to exempt bank shares from taxation because some moneyed capital was exempt."

Hepburn vs. School Directors, 23 Wall, 480.

"A State law is not violative of the act of congress merely on the ground that it allowed a "partial exemption" of a certain kind of moneyed capital, which was designed to prevent a double burden of taxation, both of property and debts secured by it."

Desty on Taxation, p. 388.

VI. COMPARISON OF THE CONSTITUTION AND STATUTES OF KANSAS WITH THOSE OF OHIO, WITH REFERENCE TO THE APPLICATION OF THE AYRES CASE TO THE CASE AT BAR.

We herewith append extracts from the Constitution of Ohio and extracts from the Statutes of Ohio, and in parallel columns quote from similar sections in the Constitution of Kansas and the Statutes of Kansas to show the similarity of the constitutional provisions and the legislation enacted thereunder in the State of Kansas. (See page 41.)

It is a well known historical fact that the Constitution of Kansas and its legislation has been largely framed upon and copied after the fundamental law and the Statutes of Ohio, and we make this comparison for the purpose of showing the applicability of the reasoning of this court in the Ayres case to the case at bar.

It will be observed by the court that the edition of the general Statutes of Kansas from which the quotations are hereafter made, are not numbered consecutively, but under the new numbering they merely follow section, article and chapter without giving to each section a separate numeral of its own.

It will be found that the section which counsel for the plaintiff in error quotes in his brief on page 25, as Section No. 6847, is in fact Section 7 of Article 1 of Chapter 158, and that Section 6851, quoted by him on the same page of his brief is now known in the Revised Statutes of Kansas of 1897 as Section 16, Article 4, Chapter 158. That section he does not quote in full.

We claim that the latter part of the section defining what debts *cannot be deducted* from credits is almost exactly similar in scope, if not in letter, to the corresponding section, being Section 2730 in the Revised Statutes of Ohio.

The Statutes of Kansas provide, in addition to what is cited in plaintiff's brief, "The person, company or corporation making out the statement of personal property to be given to the assessor claiming deductions herein provided for, shall set forth both the amount and nature of his credits and the amount and nature of his debts sought to be deducted; but no person, company or corporation shall be entitled to any deduction on account of any bond, note or obligation given to any mutual insurance company or deferred payment or loan for a policy of life insurance, nor on account of any unpaid subscriptions to any religious, literary, scientific or benevolent institutions or society; provided that in deducting debts from credits no debts shall be deducted where said debt was created by a loan on government bonds or other non-taxable securities."

Taking that portion of that section in connection with the first portion thereof cited as Section 6851 by counsel for plaintiff in error on page 25 of his brief, we find that the Statute of Kansas permitted debts of the classes named "and such as are not owing to any person, company or corporation as depositor in any bank or banking association, or with any person or firm engaged in the business of banking in this place or elsewhere;" that all debts excepting such as have been defined, can be de-

ducted from "the gross amount of the credits belonging to said person, company or corporation." "Credits" as defined by the Kansas act means and includes "every demand for money, labor or other valuable thing, whether due or to become due, but not secured by lien upon real estate." Plainly, the term "credit" in Kansas, from which debts may be deducted, is a more comprehensive term than the term "credits" in Ohio. The only class of credits prohibited from being included in that definition are those "secured by lien on real estate."

It was in the Ayres case that this court said that because the Statutes of Kansas permit some debts to be deducted from some moneyed capital, it did not follow that the moneyed capital in the State of Kansas, from which debts may be deducted as compared with national bank shares, is so large as to amount to an illegal discrimination, and surely if it would not be so large there, under their definition of the term "credits," and debts that may be deducted from "credits," then it is not large enough in Ohio to make an illegal and unjust discrimination against national bank shares.

Counsel for the bank cite the case of Dutton vs. Bank, 53 Kansas, 444, as supporting them in the position they assume. We cannot see how that can help them in the construction they contend for; for, if the court said that all corporate stocks and money secured by judgment or lien on real estate, *and substantially all moneyed capital of every description invested for profit*," shall not be used as a reason for insisting on deduction of debts from national bank shares. So, also, we in Ohio can insist that because *some debts* are deducted from *some credits*, that cannot be used as a reason, by holders of bank shares, to deduct their debts from their bank shares, being moneyed capital.

The court said in the Dutton case (Syllabus 1, "Taxation of National Bank Stock"), "The word 'credit,' as defined in Section 6847 of the General Statutes of 1889, and used in the chapter providing for the assessment and collection of taxes, does not include shares of stock in a national bank, and the owners of such shares have no right to deduct from their assessed value the amount of their debts."

(Syllabus No. 2, "Debts Owing in Good Faith—Deduction—Valid Statute"), "The statute of this State which permits debts owing in good faith by any person, company or corporation to be deducted *from the gross amount of credits belonging to such* person, company or corporation, in listing their property for taxation, when the owners of shares of stock in a national bank are not allowed to deduct their indebtedness from the value of such shares, is not in conflict with Section 5219 of the General Statutes of the United States, does not operate to tax such shares at a greater rate than other moneyed capital in the hands of individual citizens, and is valid. The law providing that all corporate stocks, all moneys secured by judgment or lien on real estate, all moneys on deposit in any bank, subject to withdraw invested for profit, shall be subject to taxation without deduction of indebtedness."

On page 460 of said report the court said:

"The credits referred to in our statute are but one of many kinds of moneyed capital, if indeed they can be regarded as capital at all. It would seem to have been the view of the legislature that only those unsecured credits which were not in general investments for profit, but would in the ordinary course of honest dealing be applied as soon as received, to the extinguishment of mortgage debts and obligations, should be subject to the deduction, and that in fact *such credits* represent no capital whatever where there was a corresponding debt to the payment of which they of right should be devoted."

In Ohio, the term "credits shall be held to mean *the excess* of the sum of all legal claims and demands, etc."

This statutory definition in Ohio of the term "credits" corresponds with the judicial interpretation given by the Supreme Court of Kansas to the term "credits" as defined in their statute above quoted.

The questions involved in the Dutton case are the same questions that came to this court in the case of Bank vs. Ayres, decided at the same term of court by the Supreme Court of Kansas in connection with the Dutton case.

The Ayres case will be found in Volume 53, Kansas Reports, page 463. On page 464 the court say: "The substantial ques-

tions involved in this case are the same as those in Dutton vs. National Bank, Ante., page 440, and the judgment herein is affirmed for the reason stated in the opinion of that case."

We contend that the affirmance of the Ayres case by this court is also an affirmance of the principles enunciated in the Dutton case, and also affirms the construction given by the Supreme Court of Ohio upon the similar question presented in this case; that is, that the word "credit" in Kansas, as in Ohio, does not include shares of stock in a national bank.

In the Dutton case, on page 446, counsel for the plaintiff in error said: "Our constitution was modeled after that of Ohio, and nearly the whole body of our statute laws was borrowed from that State. Where one State adopts the law from another, the judicial construction given to the statute in the State where it originated follows it to the State of its adoption. Citing Bemis vs. Becker, 1 Kansas, 226; Stebbins vs. Guthrie, 4 Kansas, 353." That court seems to have followed this view.

Our position is the same as the position sustained in the Ayres case; and that, the Supreme Court of Kansas has said, involves the same questions as were raised in the Dutton case; hence the Ayres case being sustained by this court, it must follow that the case at bar should also be sustained.

In the case of Hall vs. Board of Commissioners, 22 Kansas, page 37, the Supreme Court of that State held, "that time deposits were credits within the meaning of their statute defining credits."

In Ohio, time deposits are also held to be credits, being a deposit which the person owning * * * is entitled to withdraw, not on demand, as in the case of money, but at the expiration of the time mentioned in the certificate, Section 2730, Revised Statutes of Ohio.

CONSTITUTION OF OHIO.

Section 2, Article 12.

"Laws shall be passed, taxing by uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise; and also all real and personal property according to its true value in money; but burying grounds, public schoolhouses, houses used exclusively for public worship, institutions of purely public charity, public property used exclusively for any public purpose, *and personal property to an amount* not exceeding in value *two hundred dollars for each* individual, may by general laws, *be exempted from taxation;* but, all such laws shall be subject to alteration or repeal; and the value of all property so exempted, shall from time to time, be ascertained and published as may be directed by law."

Section 3, Article 12.

"*The General Assembly shall provide by law, for taxing notes and bills discounted or purchased, moneys loaned, and all other property, effects or dues, of every description, (without deduction) of all banks, now existing, or hereafter created, and of all bankers, so that all property employed in banking, shall always bear a burden of taxation equal to that imposed upon the property of individuals.*"

STATUTES OF OHIO.

Sec. 2730.

"In this title, the terms "real property" and "land" shall be held to mean and include not only land

CONSTITUTION OF KANSAS.

Section 1, Article 11.

"The legislature shall provide for a *uniform* and equal rate of assessment in taxation; but all property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, *personal property to the amount of at* least *Two Hundred Dollars, for each* family, shall *be exempt from taxation.*"

Section 2, Article 11.

"*The legislature shall provide for taxing the notes and bills discounted or purchased, moneys loaned, and other property, effects, or dues of every discription, (without deduction) of all banks now existing or hereafter to be created, and of all bankers; so that all property employed in banking shall always bear a burden of taxation equal to that imposed upon the property of individuals.*"

STATUTES OF KANSAS.

Section 2, Article 1, Chapter 158, Volume 2, of the General Statutes of Kansas Edition of 1897, is as follows:

(OHIO)

itself, whether laid out in town lots or otherwise, with all things contained therein, but also, unless otherwise specified, all buildings, structures and improvements, and fixtures of whatever kind thereon, and all rights and privileges belonging, or in any wise appertaining thereto;

The terms "investments in bonds" shall be held to mean and include all moneys in bonds, or certificates of indebtedness, or other evidence of indebtedness of whatever kind, whether issued by incorporated or unincorporated companies, towns, cities, villages, townships, counties, states, or other incorporations, or by the United States, held by persons residing in this state, whether for themselves or others;

The terms "investments in stocks" shall be held to mean and include all moneys invested in the capital or stock of any association, corporation, joint stock company or other companies, the capital or stock of which is or may be divided into shares, which are transferrable by each owner without the consent of the other partners or stockholders, for the taxation of which no special provision is made by law, held by persons residing in this state, either for themselves or others;

The terms "personal property" shall be held to mean and include, first, every tangible thing, being the subject of ownership, whether animate or inanimate, other than money, and not forming a part of any parcel of real property, as hereinbefore defined; second, the

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WORDS AND TERMS DEFINED.

Sec. 2. "The terms "real property", "real estate", and "land", when used in this act, except as otherwise specifically provided shall include not only the land itself, but all buildings, fixtures, improvements, mines, minerals, quarries, mineral springs and wells, rights and privileges appertaining thereto."

Sec. 3. "The term "personal property" shall include every tangible thing which is the subject of ownership, not forming part or parcel of real property; also, all tax-sale certificates, judgments, notes, bonds and mortgages, and all evidences of debt secured by lien on real estate; also the capital stock, undivided profits, and all other assets of every company incorporated or unincorporated, and evey share or interest in such stock, profits or assets, by whatever name the same may be designated, provided the same is not included in other personal property subject to taxation or listed as the property of individuals; and also every share or interest in any vessel or boat used in navigating any of the waters within or bordering on this state, whether such vessel or boat shall be within the jurisdiction of the state or elsewhere; and also all "property" owned, leased, used, occupied or employed by any railway or telegraph company or corporation within this state, situate on the right of way of any railway. The words "per-

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capital stock, undivided profits, and all other means not forming part of the capital stock of every company, whether incorporated or unincorporated, and every share, portion, or interest in such stock, profits or means, by whatsoever name the same may be designated, inclusive of every share, portion, right or interest, either legal or equitable, in and to every ship, vessel, or boat of whatsoever name or description, used, or designed to be used, either exclusively or partially, in navigating any of the waters within or bordering on this state whether such ship, vessel or boat shall be within the jurisdiction of this state, or elsewhere, and whether the same shall have been enrolled, registered, or licensed at any collector's office or within any collection district in this state or not; third, the money loaned on pledge or mortgage of real estate, although a deed or other instrument may have been given for the same, if between the parties the same is considered as security merely;

The term "money" or "moneys", shall be held to mean and include any surplus or undivided profit held by societies for savings, or banks having no capital stock, gold or silver coin, bank notes of solvent banks in actual possession, and every deposit which the person owning, holding in trust, or having the beneficial interest therein, is entitled to withdraw in money on demand;

The term "credits" shall be held to mean the excess of the sum of all legal claims and demands

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sonal property", when used in this act in their general sense, shall include all taxable property other than real property."

Sec. 4. The term "property", when used alone in this act, shall mean and include every kind of property subject to ownership.

Sec. 5. The term "money" or "moneys" shall mean and include gold and silver coin, United States Treasury notes and bank notes, whether in possession or on deposit, subject to be withdrawn in money on demand; and the said term "money" shall also mean and include all "time deposits" made for less period than one year by any bank, person, company or corporation with any bank, person, company or corporation.

Sec. 6. "The term 'time deposits' when used in this act, shall

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whether for money or other valuable thing, or for labor or service due, or to become due, to the person liable to pay taxes thereon, including deposits, in banks, or with persons in or out of this state, other than such as are held to be money, as hereinbefore defined, when added together (estimating every such claim or demand at its true value in money) over and above the sum of legal bona fide debts owing by such person; but in making up the sum of such debts owing there shall be taken into account no obligation to any mutual insurance company, nor any unpaid subscription to the capital stock of any joint stock company, nor any subscription for any religious, scientific, literary, or charitable purpose; nor any acknowledgment of any indebtedness unless founded on some consideration actually received and believed at the time of making such acknowledgment to be a full consideration therefor; nor any acknowledgment made for the purpose of diminishing the amount of credits to be listed for taxation; nor any greater amount or portion of any liability as surety, than the person required to make the statement of such credits believes that such surety is in equity bound and will be compelled to pay, or to contribute, in case there be no securities; provided, that pensions receivable from the United States shall not be held to be credits; and no person shall be required to take into account in making up the amount of credits a greater portion of any credits than he believes will be received or can be collected, or any

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mean and include the specific time for which the deposit was made."

Sec. 7. "The term 'credit' when used in this act shall mean and include every demand for money, labor, or other valuable thing, whether due or to become due, but not secured by lien on real estate."

Article 2 — Property Exempt From Taxation.

10. "The property described in this section, to the extent herein limited, shall be exempt from taxation:

First. All buildings used exclusively as places of public worship, as public schoolhouses or

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greater portion of any obligation given to secure the payment of rent than the amount that shall have accrued on any lease, and remain unpaid.

* * *

Section 2731 Revised Statutes of Ohio.

"All property whether real or personal in this state, and whether belonging to individuals or corporations; and all moneys, credits, investments in bonds, stocks or otherwise, of persons residing in this state, shall be subject to taxation except only such as may be expressly exempted therefrom; and such property, moneys, credits, and investments shall be entered on the list of taxable property as prescribed in this title: all tracts of land, set apart for school or ministerial purposes and sold by and under authority of law, and all lands which shall be hereafter sold by the United States, shall be subject to taxation as other lands in this state immediately after such sale: but school or ministerial lands shall not be sold for taxes until the purchase money therefor shall be fully paid but shall be returned as delinquent and continue on the duplicate, with the taxes of each year charged thereon and added to the tax and penalty due when the same became delinquent, until payment be made by the purchaser or his assigns, of such purchase money with the tax and penalty or the lands resold by the county Auditor, pursuant to the laws now or hereafter in force for the sale of such lands."

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both, with the furniture and books therein contained, and used exclusively for the accomodation of schools and religious meetings, together with the grounds owned thereby, not exceeding in any one case ten acres, if not leased or otherwise used with a view to profit; and also any parsonage or dwelling owned by any church society and occupied by its pastor as a residence, together with the ground on which it is situated, not exceeding in any case one-half of an acre.

Second. All lands used exclusively as graveyards.

Third. All buildings and parts of buildings belonging to scientific, literary and benevolent associations, used exclusively for scientific, literary or benevolent purposes, together with the lands not exceeding five acres occupied by such institutions, and attached thereto, if not leased or otherwise used with a view to profit; and all books, papers, furniture, apparatus and instruments belonging to such associations, and used exclusively for scientific, literary and benevolent purposes.

Fourth. All moneys and credits belonging exclusively to universities, colleges, academies or public schools of any kind, or to religious, literary, scientific or benevolent and charitable institutions or associations appropriated solely to sustain such institutions or associations, not exceeding in amount or in income arising therefrom the limit prescribed by the charter of such institution or association.

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Section 2739.

"In listing personal property it shall be valued at the usual selling price thereof, at the time of listing, and at the place where the same may then be; and if there be no usual selling price known to the persons whose duty it is to fix a value thereon, then at such price as it is believed could be obtained therefor, in money, at such time and place; investments in bonds, stocks, joint stock companies, or otherwise, shall be valued at the true value thereof in money; money, whether in possession or on deposit shall be entered in the statement at the full amount thereof, except that depreciated circulating notes shall be entered at their current value; every credit for a sum certain payable either in money, property of any kind, labor or service, shall be valued at the full amount of the sum so payable, except that if it be for a specific article, or for a specified number or quantity of any article or articles of property, or for a certain amount of labor or service of any kind, it shall be valued at the current price of such property or of such labor or service, at the place where payable; and annuities, or moneys receivable at stated periods, shall be valued at the sum which the person listing the same believes them to be worth in money at the time of listing."

Section 2758. Unincorporated Banks and Bankers.

"Every company, association, or person, not incorporated under any law of this state, or of the United States for banking purposes, who

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Fifth. All property belonging exclusively to this state or to the United States.

Sixth. All property belonging exclusively to any county, city, town or school district, except lands bid off for counties or cities at tax sales.

Seventh. All works, machinery and fixtures belonging to and owned by any town, city or village, and used exclusively for conveying water to such town, city or village.

Eighth. All fire engines or other implements used for the extinguishment of fire, with the buildings used exclusively for the safekeeping thereof and for the meeting of fire companies, whether belonging to any town, city or village, or to any fire company organized therein.

Ninth. Personal property to the amout of Two Hundred Dollars for each family."

Tenth. The wearing apparel of every person.

Eleventh. All public libraries.

Twelfth. Family libraries and school books of every person and family, not exceeding in value in any one case Fifty Dollars."

Section 15, Article 4, Chapter 158.

"Merchants and manufacturers stocks and moneys and credits shall be listed under two separate heads — merchants and manufacturers stock forming one item, and moneys and credits forming an-

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shall keep an office or other place of business, and engage in the business of lending money, receiving money on deposit, buying and selling bullion, bills of exchange, notes, bonds, stocks, or other evidences of indebtedness, with a view to profit shall be deemed a bank, banker, or bankers within the meaning of this chapter."

Section 2759.

"All unincorporated banks and bankers shall annually, between the first and second Mondays of May, make out and return to the Auditor of the proper county, under oath of the owner or principal officer or manager thereof, a statement setting forth:

First — The average amount of notes and bills receivable discounted or purchased in the course of business by such unincorporated banks, banker or bankers, and considered good and collectable.

Second — The average amount of accounts receivable.

Third — The average amount of cash and cash items in possession or in transit.

Fourth — The average amount of all kinds of stocks, bonds, including the United States government bonds, or evidences of indebtedness held as an investment, or in any way representing assets.

Fifth — The amount of real estate at its assessed value.

Sixth — The average amount of all deposits.

Seventh — The average amount of accounts payable, exclusive of current deposit accounts.

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other item, in the statement required to be delivered to the assessor."

Section 16, Article 4, Chapter 158.

"Debts owing in good faith by any person, company or corporation may be deducted *from the gross amount of credits* belonging to such person, company or corporation; provided, *such debts are not owing to any person, company or corporation as depositors in any bank or banking association, or with any person or firm engaged in the business of banking in this place or elsewhere;* and the person, company or corporation making out the statement of personal property to be given to the assessor claiming deductions herein provided for shall set forth both the amount and nature of his credits and the amount and nature of his debts sought to be deducted; but no person, company or corporation shall be entitled to any deduction on account of any bond, note or obligation given to any mutual insurance company, or deferred payment or loan for a policy of life insurance, nor on account of any unpaid subscriptions to any religious, literary, scientific or benevolent institutions or society; provided, that in deducting debts from credits no debt shall be deducted where said debt was created by a loan on government bonds or other *taxable* (nontaxable) securities."

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Eighth — The average amount of United States government and other securities that are exempt from taxation.

Ninth—The true value in money of all furniture and other property not otherwise herein enumerated.

From the aggregate sum in the first five items above enumerated, the said Auditor shall deduct the aggregate sum of the fifth, sixth, seventh, and such portions of the eighth as are by law exempt from taxation, and the remainder thus obtained added to the amount of item nine, shall be entered on the duplicate of the county in the name of such bank, banker or bankers, *and taxes thereon shall be assessed and paid the same as provided for other personal property assessed and taxed in the same city, ward or township.*

Section 2759a.

"The said bank, banker or bankers shall, at the same time, make statement under oath, of the amount and capital paid in or employed in such bankers business, together with the number of shares or proportional interest each share holder or partner has in such association or partnership."

Section 2759b.

"That the provisions of Section 2759 shall apply to and govern savings banks incorporated under the act of April 16th, 1867."

Section 2760.

"The averages provided for in the preceding section shall be obtained by adding together the amounts of each item above specified, owned by or standing on the books of such

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Section 60, Article 5, Chapter 158.

"Stockholders in banks and banking associations and loan and investment companies organized under the laws of this state or of the United States shall be assessed and taxed on the true value of their shares of stock in the city or township where such bank, banking association, loan or investment companies are located; and the president, cashier or other managing officer thereof shall under oath return to the assessor on demand a list of the names of the stockholders and amount and value of stock held by each, together with the value of any undivided profit or surplus; and said bank, banking associations, loan or investment companies shall pay the tax *assessed upon said stock and undivided profits or surplus, and shall* have a lien thereon until the same is satisfied."

Section 61, Article 5, Chapter 158.

"If from any causes the taxes levied upon the stock of any banking association, loan or investment companies shall not be paid by said corporation the property of the individual stockholders shall be held liable therefor; provided further, that if any portion of the capital stock of any bank or banking association or loan or investment companies shall be invested in real estate and said corporation shall

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bank, banker or bankers, on the first Monday of each month of the year preceding the Monday of May in which the return is made, and dividing the same by the number of months in the year; provided, that in case where such bank, banker or bankers commenced business during the preceding year, the division shall be made by the number of months elapsed after the commencement of such business."

INCORPORATED BANKS.

Section 2762.

"All the shares of the stockholders in any incorporated bank or banking association, located in this state, whether now or hereafter incorporated or organized under the laws of this state or of the United States, shall be listed at their true value in money, and taxed in the city, ward, or village where such bank is located and not otherwise."

Section 2763.

"Real estate of any such bank or banking association shall be taxed in the place where the same may be located, the same as real estate of individuals."

Section 2764.

"There shall at all times be kept in the office where the business of such bank or banking association is transacted, a full and correct list of the names and residences of the stockholders therein, and the number of shares held by each, which shall be at all times during business hours open to the inspection of all

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hold a title in fee simple thereto, the assessed value of said real estate shall be deducted from the original assessment of the paid-up capital stock of said corporation, and said real estate shall be assessed as other lands or lots; and provided further, that banking stock or loan and investment company stock or capital shall not be assessed at any higher rate than other property; and provided further, that the provisions of this act shall apply to all mutual fire and life insurance companies or associations having assets, accumulations, money or credits, and doing business under the laws of this state; and provided further, that such assets, moneys and credits held and under the control of such mutual fire and life insurance company or association shall be subject to assessment and taxation."

Section 62, Article 5, Chapter 158.

"Every private bank, banker, broker, building and loan and trust association shall list and return the average amount of capital invested in such business during the year ending on the first day of March next preceding the time required for listing personal property. The average amount of capital so required to be listed shall be determined by the average amount of

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officers who are or may be authorized to list or assess the value of such shares for taxation."

Section 2765.

"The cashier of each incorporated bank shall make out and return to the Auditor of the county in which it is located, between the first and second Monday of May, annually, a report in duplicate, under oath, exhibiting, in detail, and under appropriate heads, the resources and liabilities of such bank, at the close of business on the Wednesday next preceding said second Monday, together with a full statement of the names and residences of the stockholders therein, with the number of shares held by each, and the par value of each share."

Section 2766.

"Upon receiving such report the county Auditor shall fix the total value of the shares of such banks according to their true value in money and deduct from the aggregate sum so found the value of the real estate included in the statement of resources as the same stands on the duplicate, and thereupon he shall make out and transmit to the annual state board of equalization for incorporated banks a copy of the report so made by the cashier, together with the valuation of such shares as so fixed by the Auditor."

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private capital or individual funds of such bank, banker, broker, building or loan association invested, used or subject to use in such business, to which shall be added the average amount of net profits remaining undivided at the end of each month during the year."

Section 63, Article 5, Chapter 158.

"The tax assessed against all incorporated and private banks, bankers, brokers, building, loan and trust associations shall be collected in the manner provided for the collection of other personal property tax."

VII. POINTS IN THE BRIEF OF PLAINTIFF IN ERROR CHALLENGED.

1.

Under this head we call the attention of the court to the question raised by the plaintiff in error in his brief, being in that portion thereof inserted between pages 16 and 17 as to unincorporated banks and bankers being authorized by Section 2759 of the Revised Statutes of Ohio to deduct their debts from all legal claims and demands of every kind, and using this in favor of his contention, that there "is a discrimination in favor of private banks, in direct violation of the principle of uniformity and equality of taxation prescribed by the Constitution of Ohio, and in further violation of Section 5219 of the Revised Statutes of the United States."

We cannot concede that the reasoning of learned counsel is correct, nor that the conclusion which he has arrived at is borne out, either as a proposition of law or as warranted from the finding of fact set forth in the record.

On pages 15 and 16 of his brief he refers to Section 2759 of the Revised Statutes of Ohio, and the same is quoted at length in his brief. We do not consider it to be necessary here to again quote it but refer the court to that portion of our brief wherein we cite and quote the same section.

The Supreme Court of Ohio did not say in this case, that incorporated banks, both state and national, and unincorporated banks, both proceed in the same way, and pursuant to the same section, to make their returns for taxation to the taxing officers of the State. Under Sections 2762 to 2767 inclusive, a method is pointed out, by which stockholders in "incorporated banks or banking associations" shall have *their shares taxed*. Under Section 2759 of the Revised Statutes of Ohio a method is pointed out by which "unincorporated banks" shall have their property taxed. Such banks do not have *shares* in the sense as used in Sections 2762 to 2767 inclusive, and persons engaging in the banking business under Section 2759 of the Revised Statutes of

Ohio are partners. Their interest in such business are not denominated shares, and are not capable of being listed under the sections of the statutes governing incorporated banks and banking associations. To meet the case of unincorporated banks some other method had to be devised by the legislature for the purpose of getting at the true taxable valuation, which is the true value in money, of the property engaged in such business. The legislature for that purpose enacted Section 2759, and it does not follow, as we have hereinbefore mentioned, that because methods or systems of taxation may differ, that the ultimate result—equality of taxation—cannot be attained. This is another instance of where classification of various kinds is permitted to be made in order to attain that object, and that each class of property may bear its proportionate amount of taxation.

The question then is, does Section 2759 provide substantially with regard to unincorporated banks what Sections 2762 to 2766 inclusive provides for incorporated banks and banking associations?

In examining this question we first refer to the criticism made by the counsel for the plaintiff in error, at the bottom of page 15 of his brief. Speaking of the Supreme Court of Ohio, he says: "It also fell into a like error in supposing that Section 2759 has any reference whatever to incorporated banks; it related wholly as its terms show to unincorporated banks and bankers."

In the body of its decision on page 328 of Volume 56, Ohio State Reports, the Supreme Court say:

"But in this State both national and state banks are taxed under the same section, being Section 2762, Revised Statutes, and in fixing the value of the shares, the bank deducts its debts from its credits, so that it pays taxes only on the net valuation."

This is true in the sense in which the court stated it, and we must read the context in order to determine what banks the court meant, when it so stated. Incorporated state banks and national banks are all listed together under Sections 2762 to 2766 inclusive, of the Revised Statutes of Ohio, and because the Supreme Court said, "both national and state banks are taxed under the same section, being Section 2762," they should not be understood as saying that *all* state banks are taxed under Section 2762, for

in the very next line on the same page cited above (page 328) the court say:

"Unincorporated banks are taxed in the same manner by deducting debts from credits, so as to pay only on the net capital stock."

It is therefore made evident that the court had before them both sections referred to, Section 2759 and Section 2762. And when they said "that unincorporated banks are taxed in the same manner," they meant by that, as they have defined their own meaning, "so as to pay only on the net capital stock." And because the court said that unincorporated banks are taxed in the same manner as national banks, and as incorporated state banks, they do not say that they are taxed by the same method, but that the same object is attained.

At the top of page 329 of the report the reporter makes them to say, that Section 2759 refers to the case of incorporated state banks, but it is plainly a miss-print, as it should have been written unincorporated, instead of incorporated, but all that follows after the word "incorporated," is true with regard to unincorporated state banks, that is "the holder of said stock is compelled to pay taxes upon said value, and is not permitted to deduct *his* legal bona fide debts therefrom." The deductions of the *bank's* indebtedness is not denied by Section 2759; and this court will here make the discrimination between the bank as an entity ,and the partners composing it or individuals owning the capital stock therein. *The bank* has full power given it to deduct *its* indebtedness, but the partners or individuals composing the bank have no authority to deduct *their individual* indebtedness from their holdings or interest in the banks organized under Section 2759, Revised Statutes of Ohio.

The fallacy in the position of counsel for plaintiff in error consists in stating, or in leaving the court to infer, that Section 2759 permits the individuals to deduct *their* indebtedness from their holdings in unincorporated banks, while such privilege is not accorded the holders of national bank shares in Ohio. In this regard Section 2759, Revised Statutes of Ohio, treats the owners of its capital stock in the same manner as Sections 2762 to 2766 inclusive.

It will be noticed by the court, that under Section 2759, Revised Statutes of Ohio, as cited on page 16 of plaintiff's brief, the third item of said section being "the average amount of cash and cash items in possession and in transit shall be added together into one amount," in the manner suggested in the ninth item of that section. That is, "from the aggregate sum of the five items above enumerated, the said auditor shall deduct the aggregate sum of the fifth, sixth, seventh and such portions of the eighth item as are by law exempted from taxation, and the remainder thus obtained added to the amnout of item ninth shall be entered upon the duplicate of the county in the name of such bank, and taxes thereon shall be assessed, etc."

Following the direction of that statute, and adding together the first five items, it would include *item third*, "being the average amount of cash and cash items in possession or in transit"; and to be permitted to deduct the fifth, sixth, seventh and such portions of the eighth item, *from that* item, would permit such unincorporated banks to have their debts deducted from *their cash and cash items.* This would contravene the principles as set forth in Bank vs. Hines, 3 Ohio State, page 1, and the other cases hereinbefore cited; and for some reason, probably best known to counsel for plaintiff in error, he did not say that that portion of Section 2759, that permits debts to be deducted from cash and cash items, was held by the Supreme Court of Ohio to be unconstitutional.

This will be found in the case of Treasurer vs. Bank, 47 Ohio State, 503, decided October 28th, 1890, so that since that time that portion of the section has been inoperative.

That portion of the syllabus referring to this question is as follows:

"That part of Section 2759, of the Revised Statutes, regulating returns for taxation of unincorporated banks and bankers, which provides that from the aggregate sum of the first five items therein enumerated, the county auditor shall deduct the aggregate sum of the fifth, sixth, seventh and such portions of the eighth items as are by law exempt from taxation, is not repugnant to either Section 2 or Section 3 of Article 12 of the Con-

stitution, *except to the extent of including the entire third item among those from which the deduction is to be made.*

"A deduction under Section 2759 of the average amount of all deposits and the average amount of accounts payable, exclusive of current deposit accounts, from the average amount of notes and bills receivable, discounted or purchased in the course of business, by such incorporated bank or bankers, and considered good and collectible, would not be in conflict with either of the above named sections of the Constitution; but, the same deduction from the average amount *of cash and cash items* in possession would contravene Section 2 of Article 12 of the Constitution.

"One part of a section of a statute may be void for want of conformity to the Constitution, without affecting the validity of the remainder, unless the objectionable and unobjectionable portions are essentially and inseparably connected in substance, or are so interdependennt that the general assembly would not have enacted the one without the other."

The court on page 522 of said report says:

"The average amount of all deposits, and of accounts payable, returned by the defendant in the sixth and seventh items of its statement should, therefore, be deducted from the average amount of all its notes and bills receivable, discounted or purchased.

"But this deduction should not be made from the average amount *of cash and cash items* in possession. Money or cash, for the most part, is regarded and treated as property in possession, having intrinsic value, and not the mere evidence of claims upon others. As property in hand, of a tangible nature, distinctive in itself, and determinable as to value without the uncertainty of mere choses in action, it cannot be reduced or diminished on the tax duplicate by deducting from it the liabilities of the owner—whether individual or corporation—without an infringement of the constitutional requirement that all property shall be taxed by a uniform rule. And that portion of Section 2759 of the Revised Statutes, which directs the auditor to make the enumerated deductions, so far as it includes in the aggregate from which the deductions are to be made, *the average amount*

of cash and cash items in possession is, in our view, repugnant to the Constitution and void, but is not otherwise objectionable on constitutional grounds."

As proof that the Supreme Court of Ohio considered that, if the third section was eliminated from the statute it would not give unincorporated banks any advantage over other similar organizations or individuals, we quote what the court say on page 524:

"And furthermore the elimination of the right to make deduction from the average amount of cash and cash items in possession, would only leave the bank on a footing of that equality *with individuals contemplated in the Constitution*—clothed with the right of deducting the sum of its legal bona fide debts, from the sum of its legal claims and demands, and of being taxed on the excess *as credits*."

Having eliminated this one point of contention, what is left of the objection made by counsel that Section 2759, Revised Statutes of Ohio, discriminates in favor of unincorporated banks as against national banks' shares in violation of Section 5219, Revised Statutes of the United States?

Counsel for plaintiff in error further say on page 16½ of their brief, in referring to unincorporated banks, as follows: "They are also authorized to deduct their debts from *investments in stocks of all kinds*. The section requires by subdivision 4 the statement of the bank to the auditor to contain the average amount of all kinds of stocks and bonds, and other evidence of indebtedness, held as an investment, as well as to deduct the debts from bills and accounts receivable. By this section the debts of the bank are taken from the *moneyed investments of every kind*, a right withheld from incorporated state banks, as well as from national banks, thereby creating a discrimination in favor of private banks in direct violation of the principle of uniformity and equality of taxation, etc."

This proposition we deny. This is merely a construction given to this statute by counsel to assist him in his contention in the case at bar; but his construction does not agree with the construction given to the same section, in the case above cited, 47 O. S., 521, by the Supreme Court of Ohio.

That court on page 521 speaking of the term "credits" and of the statutory definition thereof, as well as the judicial interpretation that had been given it, closes the subject in these words:

"Acquiescing in the meaning of the term as thus settled by statute, the amount of the credits of the defendant to be placed upon the duplicate for taxation, will be the excess of all its legal claims and demands over and above its bona fide debts; in other words, its credits will be estimated by deducting such debts *from its legal claims and demands*. What were the legal claims and demands of the defendant as set forth in the return made to the county auditor? They are embraced in the first item of the bank's statement, and are denominated the average amount of all notes and bills receivable, discounted or purchased. From this amount is to be deducted the sum of the legal bona fide debts owing by the bank, which as appear in its return, are specified in the sixth and seventh items, and include the average amount of accounts payable, exclusive of current deposits accounts. * * * The average amount of all deposits, and of accounts payable, returned by the defendant in the sixth and seventh items of its statement, should, therefore, be deducted from the average amount of all its notes and bills receivable, discounted or purchased."

So that the construction as given to said section by the Supreme Court of Ohio is not that such banks are authorized to deduct their debts from investments in stocks of all kinds. Nor does it permit the auditor to deduct the debts of the bank from the amount invested in stocks and bonds and other evidences of indebtedness held as an investment; nor are the debts of the bank to be taken from the moneyed investment of every kind; but on the contrary, the average amount of all deposits contained in the sixth item, and the average amount of accounts payable contained in the seventh item, are to be deducted from the average amount of its notes and bills receivable, discounted or purchased contained in the first item, and that construction given to it by the Supreme Court of Ohio does not contravene Section 5219 of the Revised Statutes of the United States and does not discriminate against national bank shares.

"The construction given to a State statute by its court of last resort will be followed by this court."

Having as we think met the objection made by counsel for plaintiff in error to Section 2759, Revised Statutes of Ohio, what becomes of his contention that the rights conferred by that section are withheld from incorporated state banks as well as from national banks?

We have called attention to the fact that *the bank* as *a bank*, is permitted under Section 2759, to deduct *its* debts, being the sixth and seventh items, from *its* credits, being the first item, as contained in said section; and further, that this right cannot be construed *to extend to the individuals composing the partners in such banks*. The deduction contemplated, is that of the *institution* and not of the *individual* engaged in the institution. This is true in the same degree with incorporated banks, though the method suggested by Sections 2762 to 2766 inclusive, Revised Statutes of Ohio, is different than the method employed for taxing unincorporated banks.

The Supreme Court in the case at bar, on page 329 of their decision, say: "In the case of unincorporated banks when the net value of the capital is ascertained, the bank pays the taxes thereon, *and the several owners of the capital are not allowed to deduct any of their debts from their share of such capital.* It is thus clear that moneyed capital invested in national banks is placed upon an exact equality with capital invested in state banks, and this is all that can be reasonably asked for national banks, in the absence of a showing to the effect that moneyed capital invested in state banks is unreasonably discriminated against. That there is no discrimination against capital invested in state banks, is so clear that no argument is required to establish the fact; and that capital invested in national banks is put upon an exact equality with capital invested in state banks, is equally clear from the sections above referred to. It would therefore seem clear that there is no such discrimination against national bank shares as to give just ground for complaint."

This view of our Supreme Court is supported by the finding of facts, and the uniform practice prevalent in the State of Ohio

with regard to listing the shares of incorporated state banks and national banks.

What can be used as a basis for the assumption of counsel for plaintiff in error, that there is a discrimination made by Section 2759, Revised Statutes, against national bank shares? It is not warranted by the finding of fact, because nothing is before this court showing the amount of moneyed capital employed as capital in unincorporated banks. No evidence is before the court to show that there is even one unincorporated bank in the State of Ohio; and nothing before the court that can be employed "as a basis of comparison with national bank shares." So far as conclusions of fact are concerned, there is nothing contained in the finding. As a question of law, the Supreme Court of Ohio has decided from its own knowledge in this case, that there is no such discrimination against national bank shares as to give just ground for complaint. Counsel admits in his brief, that incorporated state banks and national banks are both treated alike by the Statutes of Ohio, and yet wishes you to find that there is a discrimination made in favor of unincorporated banks, when both the law and the facts are against him.

We have now analyzed the various sections of the Ohio Statutes which relate to and govern the taxing of incorporated banks, including state and national incorporated banks, and also the statute relating to the taxing of unincorporated banks. And the question is presented by opposing counsel that there is a discrimination in the taxing methods between national banks and unincorporated banks, because the section of the Ohio laws, 2759, allows unincorporated banks to make certain deductions from certain credits, but not from all credits, and that this same privilege is not extended to national banks.

It will be noted that Section 2759 relates to private persons engaged in banking, and that it was necessary to have a law governing the taxing of individuals engaged in banking business, and as has already been cited under this heading, as a private individual engaged in banking business did not have his capital represented by shares, a different plan had to be pursued in arriving at the taxing value, and such a bank is in fact treated in the

same manner as a national bank, and we must not be confused in making a comparison of a private and unincorporated bank with national bank shares. The only contention of counsel can be that if a deduction is permitted to be made by a private bank, and the same privilege is not accorded to national bank shares, that there is a discrimination with other moneyed capital.

We quote the following language from the brief of Hon. Jacob F. Burkett of counsel for defendant in error in the case of Charles E. Niles, plaintiff in error, vs. Oliver P. Shaw, treasurer, etc., defendant in error, and reported in 50 O. S., 370, being the same gentleman who, as judge of the Supreme Court of Ohio, delivered the opinion in the case at bar:

"When a holder of national bank stock is deprived from deducting therefrom his bona fide debts, he is deprived of no right allowed to other individuals having the same investments, that is 'investments in stocks,' but they all stand upon an equality. If the national bank man has any credits he is allowed like any other individual to deduct therefrom his bona fide debts, and in that respect again there is an exact equality."

The question therefore is probably presented now, whether or not, by reason of the fact that under Section 2759 the owner of moneyed capital invested in private unincorporated banks is allowed to make certain deductions, or *some* deductions from *some* credits, that that amounts to a discrimination as against owners of national bank shares, such as will come within the provision of Section 5219, Revised Statutes of the United States. We would respectfully suggest to the court that counsel on the other side has not made clear in his brief the distinctions that must be observed in arriving at a correct solution of this problem as we have hereinbefore outlined and explained.

We would say upon this proposition, that the same argument which has been made in a former part of this brief, upon the question as to whether or not there is any discrimination under Section 2730 of the Revised Statutes of Ohio, against owners of national bank shares, by reason of that provision allowing certain deductions to be made from some credits, will equally apply to the question now present under Section 2759.

The same principles of law will apply in determining this question, as will apply in determining the other question of discrimination; and the doctrine fully argued at that point, which has been enunciated by this court in the case of the First National Bank vs. Ayres in 160 U. S., 660, will apply and govern this section.

The deductions which the individual owner of moneyed capital is allowed to make under Section 2759 is of no greater amount than the deductions which the individual owner of credits under Section 2730 is allowed to make for his debts, and therefore, merely, because one law allows an owner of moneyed capital to make some deductions from some credits, does not come within Section 5219, Revised Statutes U. S., for this court has held in the Ayres case, Supra, that in order that a State law shall amount to such a discrimination against national bank shares as will be illegal and in violation of the provisions of Section 5219, it must be so large and substantial as to amount to an illegal discrimination. That fact must be found as a fact by the courts below to enable a reviewing court to determine whether or not an individual owner or owners of moneyed capital invested in private banking business is allowed, or does make deductions under Section 2759, to such an extent as amounts in fact to a substantial discrimination.

And the court will look in vain for any such a finding in the record in this case. So that upon the face of the record it will be forced to conclude that until parties present such facts as will show an illegal discrimination under Section 2759, that there is none.

2.

We next challenge the reason as given by counsel for plaintiff in error on page 15 of his brief, assigned by him why congress by the amended act of 1868 struck out of the original section (being the 41st Section of the act of 1864, 13th United States Statutes at large, page 111), the second restriction or limitation that was placed by congress upon the State's right to tax national bank shares. The part so stricken out by the amended act is as follows:

"Second, that the tax so imposed under the laws of any State upon the shares of any of the associations authorized by the act should not exceed the rate imposed upon the shares of any of the banks organized under State authority."

What was the motive for congress striking out that limitation and what results followed in the construction of said act, which is now 5219, Revised Statutes of the United States, by such amendment?

Counsel in his brief filed in the court below found on page 5 thereof, contended, "That the language 'other moneyed capital in the hands of individual citizens of the State' did not and does not mean other moneyed capital invested in shares of other banks, is perfectly obvious from the fact that the amended section, as above shown, entirely omitted that element of comparison. It was evidently stricken out to avoid any such limit to the comparison."

In the brief filed by counsel in this court he adheres to the same position by saying on page 15: "By the amended act of 1868, the second of the above restrictions, viz., limiting the rate of that imposed upon banks organized under said authority, was remitted, leaving the statute in the present form, and therefore eliminating from the consideration of the question all comparison with the taxation upon shares of State banks, except as they were to be treated under the first restriction as moneyed capital in the hands of individual citizens of the State. This amendment showed very clearly the intention of congress not to make the valuation of capital in state bank shares the measure of the valuation of the shares of national banks. If it had so intended it would have repealed the first limitation or restriction above recited, and permitted the second to stand."

With this construction we do not agree. The object of congress in striking out that second limitation and the effect it may have had upon the construction of the act, we consider to be an element in this case. The reason for leaving out the restriction above quoted, appears to us to be because that restriction, viz., "that the rate should not exceed that imposed upon the shares of any banks organized under State authority," is embraced within the restriction, "That it shall not be at a greater rate than is as-

sessed upon other moneyed capital in the hands of individual citizens of said State."

That is, the phrase, "moneyed capital in the hands of individual citizens," includes moneys invested in shares of state banks. The latter expression merely shows the character of the investment, while the former is the comprehensive term descriptive of such character of investments, be it in state or national banking associations. Hence, to leave both restrictions standing together in the same act, when one by proper construction would include the other, would be tautological, and for that, as one of the reasons, the less comprehensive restriction was eliminated from the statute.

It was not for the reason as assigned by counsel, that congress desired to eliminate from the consideration of the question all comparison with the taxation upon shares of state banks; for we still contend that since the enactment as above stated, this court has considered investments in state banks as one of the factors of value by which to fix the rate imposed upon the shares of national banks.

Another reason for this elimination from the statute is that found in the opinion of the court in Lionberger vs. Rouse, 9 Wallace, quoting from page 474:

"The national banks were created especially to provide a national currency at a time when the state banks furnished the entire paper circulation of the country. In providing a system by which the states, where national banks were located and did business, could tax their shares, it was important as their notes came in competition *with state bank paper*, that there should be no unfavorable discrimination against them. It was easy to see that an unfriendly State could legislate so as to provide for different circulation, and this consideration induced congress to limit the State power of taxation in two particulars. In declaring that national bank shares should be taxed like other moneyed capital, and that no burden should be imposed on them from which state banks were exempt, all was done that the necessity of the case required. There was nothing to fear from banks of discount and deposit merely, for in no event could they work a displacement of national bank circulation. It seems,

therefore, clear that the proviso to the 41st Section *was meant by congress to apply to banks of issue.* It is proper in this connection to observe, that the changed condition of the banking interests of the country, *has been the occasion of further legislation by congress on this subject, and that now the power of state taxation over the shares of national banks is subject only to the restriction that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens.*"

Or, it might be said, that state banks having ceased to be banks of issue, the limitation was removed. The reason of the rule having ceased, the rule ceased.

On page 476 of the same report this court say:

"Without pursuing the subject further, it is enough to say, in our opinion, congress meant no more by the second limitation in the proviso to the 41st Section of the national bank act, than to require of each State, as a condition to the exercise of the power to tax the shares in national banks, that it should, as far as it had the capacity, tax in like manner the shares of banks of issue of its own creation."

3.

On page 18 of counsel's brief, it is said, "Inasmuch as every man in the State is authorized to enter into this kind of banking and possess himself of this privilege of competition and thereby bring himself into sharp competition with national banks in carrying on his banking business, a marked discrimination against national bank shares results."

The proposition is denied, as heretofore contended, that because an individual in the State of Ohio invests his capital in an unincorporated bank, it does not thereby give him greater rights *as an individual*, to have his debts deducted from his credits, than he possessed prior to entering into such unincorporated bank. For the banker can only deduct the debts of the bank and not the debts of the individuals composing it.

The individual can deduct certain debts from certain credits by virtue of Section 2730 of the Revised Statutes of Ohio, but

he cannot as an individual, obtain any further right or benefit by entering into an unincorporated bank and investing his capital therein, than if remaining out of the same.

4.

On page 22 of the same brief criticism is made by counsel of the case of Niles vs. Shaw, 50 O. S., 370, as being an ill-considered case, and denied its authority as a precedent to control that court or this court in its judgment.

We contend that the case of Niles vs. Shaw, 50 O. S., 370, is the first authoritative expression by the Supreme Court of Ohio of the express question that is raised in this case. In all the other cases that had preceded that one in the State of Ohio, other propositions were linked up with the question of the right to deduct debts from credits; and in considering it, special stress was laid upon the other phases of the question presented, more than upon the question of the deduction of *some debts from some credits*. As in the case of Bank vs. Hines, the right to deduct debts from "*money*" as defined by the Ohio Statute was considered. That same question was again considered in the case of Latimer vs. Morgan, Supra. In the case of Payne vs. Watterson, Supra., the question was presented of the right to deduct debts from "*investments in bonds;*" and in the case of Treasurer vs. Bank, Supra., the question was presented of the right of an unincorporated bank to deduct its debts from "*its cash and cash items.*"

So that we are warranted in our statement that the case of Niles vs. Shaw is the first expression of the Supreme Court of Ohio on the direct question in issue here.

And as the Whitbeck case was decided by this court on April 23d, 1888, the Niles vs. Shaw was not decided until May 9th, 1893, and the case at bar was not decided by the Supreme Court of Ohio until April 27th, 1897, therefore this court did not have before it at the time of the decision of the Whitbeck case an authoritative expression from the Supreme Court of Ohio upon the question at bar, meaning thereby the right to deduct debts from national bank shares as credits.

We claim that this court will follow the construction given the taxing laws of a State by the courts of last resort of that state; and that where this court may have construed a statute of a State, or announced the policy of a State with regard to any particular legislation of the State, before the Supreme Court of that State had construed such act or announced such policy, that if the Supreme Court of the State, after such decision by this court, takes a different view than that taken by this court of matters relating to State legislation, this court will follow the last expression of the Supreme Court of the State upon such subject.

Under Section 4, page 614, Supplement to the Revised Statutes of the United States, Second Edition, 1874 to 1891, it is provided that for the purpose of all actions against national banks, they are to be deemed citizens of the State in which they are located.

"It is the peculiar province of the State courts to construe their own statutes."

See opinion of Judge Grier in Commercial Bank of Cincinnati vs. Buckingham, 5 Howard, 342, 343.
See also, Adams vs. Preston, 22 Howard, 473.
Congdon Mining Co., vs. Goodman, 2 Black, 574.
Smith vs. Adsit, 16 Wall, 185.
Kingler vs. Missouri, 13 Wall, 257.
Murray vs. Gibson, 15 Howard, 421.
Nichols vs. Levy, 5 Wall, 433.

In the foregoing cases the Supreme Court of the United States refused to disturb the decisions of the Supreme Courts of the states in their construction of State laws.

"The decision of the Supreme Court of a State upon a question of local nature involving the internal policy of the State should be generally followed by the federal courts as binding and conclusive, when the question so decided is afterwards raised in the latter courts between the same parties."

Forsythe vs. Hammond, 166 U. S., 506, 520.
See opinion of Justice Brewer, p. 519, and cases cited.

"The same reasons which require that the final decision upon all questions of national jurisdiction should be left to the national

courts will also hold the national courts bound to respect the decisions of the State courts upon all questions arising under the State constitutions and laws, where no questions of national authority is involve l, and to accept those decisions as correct, and to follow them whenever the same questions arise in the national courts."

Cooley's Const., Lim. 13.

See footnote to the foregoing, citing numerous authorities in support of the text.

"When the construction concerns the construction or effect of any provision of the Constitution of the State, or, of a statute, and it has been authoratively decided by the court of last resort in the State, the federal courts will consider themselves bound to adopt and apply the doctrine so laid down."

Black's Const. Law, 140.
Shelby vs. Guy, 11 Wheat., 361.
Tp. of Elmwood vs. Marey, 92 U. S., 289.
Cornell University vs. Fiske, 136 U. S., 152.
Sedgwick on the Construction of Statutes, 368.

"The construction given to a statute of a State by the highest tribunal of such State, is regarded as a part of the statute, and is as binding as is the text, upon the courts of the United States."

Gilma vs. Sheboygan, 2 Black, 510.
McClung vs. Silliman, 3 Peters, 270.
Green vs. Neal, 6 Peters, 291.
Ross vs. Duvall, 13 Peters, 45.
Massingill vs. Downs, 7 Howard, 767.
Nesmith vs. Sheldon, 7 Howard, 812.
Van Ramsellaer vs. Kearney, 11 Howard, 297.
Webster vs. Cooper, 14 Howard, 504.

23 Am. & Eng. Encyclopædia of Law, under the head of "Stare Decisis," it is stated: "On the question of the construction or interpretation of State statutes or constitutions, the decisions of the court of the State whose constiution or statute is in question are followed by the federal courts."

The text is supported by a great array of authorities, collated in a footnote on pages 38 and 39.

In the case of Gilman vs. Sheyboygan, 2 Black, 510, the Supreme Court of the United States followed the decision of the

Supreme Court of the State, holding a statute requiring a railroad aid tax leviable exclusively on realty to be "in violation of a provision of the State Constitution, declaring that the rule of taxation should be uniform, and that taxes should be levied on such property as the legislature should prescribe."

Justice Swayne says, page 518:

"Acting upon a principle, recognized in its administration from the earliest period of its history, this court decides and considers itself bound in cases like this, to follow the settled adjudication of the highest State court, giving construction to the Constitution and laws of that State."

Citing Leffingwell vs. Warren, Supra.

In the First National Bank of Garnett vs. Ayres, 160 U. S., 660, it is held that:

"By the decision of the Supreme Court of Kansas, Section 6847, of the General Statutes of that State, defining the word "credit", as used in the chapter providing for the assessment and collection of taxes, was held not to include shares of stock in a national or state bank, and the owners of such shares were held to have no right under that statute to deduct from the assessed value of their shares the amount of their debts. This court is bound by the interpretation given to the Kansas Statute by the Supreme Court of that State. (New York vs. Weaver, 100 U. S., 539, 541.)"

"Legislation providing for the assessment of railroad property by a State board, while all other property in the State is assessed by county officials, is not obnoxious to any provision in the Federal Constitution.

"The decision of the Supreme Court of Indiana in this case that the Constitution of that State authorizes just the method of assessment adopted in this case, is conclusive upon this court.

"The construction placed by the Supreme Court of the State on the Indiana act of March 6th, 1891 that the railroad companies are given the right to be present and to be heard before the State Board of Tax Commissioners, is conclusive upon this court."

P. C. and St. L. R. Co. vs. Becker, 154 U. S., 421-427.

In Christy vs. Pridgeon, 4 Wall, 203, Justice Field, speaking for the court, says:

"The interpretation within the jurisdiction of one State becomes a part of the law of that State, as much so as if incorporated into the body of it by the legislature. If, therefore, different interpretations are given in different states to a similar local law, that law in effect becomes by the interpretations so far as it is a rule, for one action, a different law in one State from what it is in the other."

To the same effect is Detroit vs. Osborne, 135 U. S., 492.

In A. and G. R. R. Co. vs. The State of Georgia, 98 U. S., 359, an issue was made concerning the legality of a tax imposed upon a railroad. Judgment was given in favor of the validity of the tax, and affirmed by the Supreme Court of the State. The cause was brought into the Supreme Court of the United States by a writ of error. The court say:

"The judgment of the highest court of a State, that a statute has been enacted in accordance with the requirements of the State Constitution is conclusive upon this court, and it will not be reviewed."

In Town of Elmwood vs. March, 92 U. S., 289, the court say:

"This court will follow the decisions of the Supreme Court of a State, that certain town bonds were void because the law which authorized their issue was in violation of the law of the State."

"This court has always followed the highest court of the State in the construction of its own constitution and laws."

See Phœnix Fire and Marine Ins. Co. vs. State of Tennessee, 161 U. S., 174.

May vs. Tenney, 148 U. S., 60.

Leeper et. al. vs. State of Texas, 139 U. S., 462.

Tioga R. R. Co. vs. Blossburg & C. R. Co., 20 Wall, 137, 143.

Amy vs. Dubergne, 98 U. S., 470.

Moores vs. Citizens' Nat. Bk., 104 U. S., 629.

Oaks vs. Mase, 165 U. S., 363.

Forsythe vs. Hammond, 166 U. S., 506, 518.

"The meaning of a State statute, declared by the highest court of a State, is conclusive upon this court.

"*As to the proper construction of a state statute, and as to what is to be regarded as among its terms, no Federal question can arise.*"

Morley vs. R. R. Co., 146 U. S., 162.

"*If the highest judicial tribunal of a state adopt new views as to the proper construction of a statute of the state and reverse its former decisions, this court will follow its latest adjudication.*"

Bauserman vs. Blunt, 147 U. S., 647.

See also, Long Island Water Supply Co. vs. Brooklyn, 166 U. S., 68, 88.

Merchants' Bank vs. Pennsylvania, 167 U. S., 416, 462.

Water Power Co. vs. Water Commissioners, 168 U. S., 557, 566.

Dibble vs. Bellingham Land Co., 163 U. S., 142.

McCain vs. City of Des Moines, 84 Feb. Rep., 726.

Leighton vs. Young, 52 Fed. Rep., 439.

Western Union Tel. Co. vs. Poe, 64 Fed. Rep., 9.

Crowther vs. Richly Ins. Co., 85 Fed. Rep., 41.

Hitt vs. Hitt, 85 Fed. Rep., 268.

Hodge vs. Magnes, 85 Fed. Rep., 355.

The case of Chapman vs. The First National Bank, 56 O. S., 310 (the case at bar), is one in which our Supreme Court construes the taxing laws of this State. The bank in its petition set out that certain of its stockholders, naming them, were each indebted and owing to others of legal bona fide debts, a sum in excess of their credits, from which, under the laws of this State, they were entitled to deduct said debts to an amount equal to the value of such shares. In other words, the bank, assuming to act as trustee or guardian for its stockholders, claimed that the shares of stock held by its stockholders constituted a credit from which they were entitled to deduct their indebtedness when listing their property for taxation. The court held that the shares, for the purposes of taxation, are stocks, and not credits.

The issues in the case raise no question upon Section 5219, R. S. U. S.

VIII.

Every presumption is against any exemption from taxation; the claim made in the bill of the plaintiff bank is plainly one claiming certain property to be exempted from taxation. Where an exception or exemption is claimed, the intention of the general assembly to except must be expressed in clear and unambiguous terms. The existence of the right must be clear. The exemption must be shown to exist without doubt. At the outset every presumption is against it. A well founded doubt is fatal to the claim. It is only where the terms of the concession are too explicit to admit fairly of any other construction that the proposition can be considered.

This is the rule adopted both by the Federal Court and the Supreme Court of the State of Ohio.

See Treas. vs. Sturges, 46 O. S., pages 153 to 178 inclusive.
Railway Co. vs. Supervisors, 93 U. S., 595.
Tucker vs. Fergueson, 27 Wallace, 527.
Delaware Railroad Tax, 18 Wallace, 206.
Kirtland vs. Hitchkins, 42 Conn., 426.
Cincinnati College vs. State, 19 O., 110.
Railroad vs. Dennis, 116 U. S., 665.
Farrington vs. Tenn., 95 U. S., 679.
Railroad vs. Guffey, 120 U. S., 569.
Railroad vs. City of Saco, 60 Maine, 196.
Lima vs. Cemetery Association, 42 O. S., 128.

It cannot be said that the legislature of Ohio, in enacting the laws hereinbefore cited, has done so with any intention of discriminating against national bank shares and in favor of any other moneyed capital. The statute, which is now Section 2730, was passed in 1859, several years before national banks were established, and hence it cannot be claimed that it was passed for the purpose of discriminating against national bank capital. It treats national bank capital exactly as it treats other bank capital, or exactly as it treats any other capital invested in "stocks"; and capital invested in national bank stock is treated exactly as

capital invested in other "stock." We claim that a national bank has no right to complain.

CONCLUSION.

In conclusion we would say, we have not noticed or commented upon the statistics quoted by counsel for plaintiff in error in his brief, and do not wish our silence to be construed as admitting that the statements of fact therein made are truly stated, or that they are properly before the court. On the contrary, we deny the statements, and deny the right of counsel in attempting to add to the findings of fact by such matters as are *aliunde* the record.

Respectfully submitted,

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FIRST NATIONAL BANK OF WELLINGTON *v.* CHAPMAN.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 137. Argued January 13, 16, 1899. — Decided February 27, 1899.

The system of taxation adopted in Ohio was not intended to be unfriendly to, or to discriminate against owners of shares in national banks, and, in its practical operation it does not materially do so; and there is nothing upon the face of these statutes which shows such discrimination.

The term "moneyed capital" in the act of Congress fixing limits to state taxation on investments in national banks, Rev. Stat. § 5219, does not include capital which does not come into competition with the business of national banks, and exemptions from taxation, made for reasons of public policy, and not as an unfriendly discrimination against investments in national bank shares, cannot be regarded as forbidden by those statutes.

THIS action was brought to restrain the collection of taxes, through or by means of the bank, by the defendant in error, levied under a statute of Ohio, upon certain individual shareholders in the bank, on the ground, as alleged, that the assessments upon such specified shareholders were illegal, as having been made without regard to the debts of such individual

owners, contrary to the case of other moneyed capital in the hands of individual citizens whose debts were permitted to be deducted from the value of such capital before the assessment of taxes thereon.

The petition contained allegations intended to show a case for the interposition of a court of equity, and a tender was therein made of the amount of the taxes which the plaintiff admitted to be due on such shares after deducting the debts.

The answer, while not taking any objection that a case for equitable relief by injunction was not made, provided the contention of the petition as to the assessments being illegal was well founded, claimed, substantially, that by the laws of the United States and of Ohio the assessments were legal, and the petition should therefore be dismissed. Upon trial in the court of common pleas of Lorain County the court found the following facts:

"First. Plaintiff is a national banking association, incorporated under and by virtue of an act of Congress, entitled 'An act to provide for the national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof,' approved June 3, 1864, and the amendments thereof, and is established and doing business in the village of Wellington, county of Lorain, and State of Ohio.

"Second. The defendant is the duly elected and qualified treasurer of the county of Lorain and State of Ohio.

"Third. The plaintiff has a capital stock of $100,000, divided into 1000 shares of $100 each, all of which are fully paid up, and certificates for the shares are outstanding and owned by a large number of persons.

"Fourth. That in accordance with section 2765 of the Revised Statutes of Ohio, then and now in force, the cashier of plaintiff duly reported in duplicate to the auditor of said county the resources and liabilities of said banking association, at the close of business on the Wednesday next preceding the second Monday of May, 1893, together with a full statement of the names and residences of the shareholders therein, with the number of shares held by each, and the par value thereof, as required by said section; that included in said return so

made by said cashier was the real estate owned by the plaintiff, valued at $3420, separately assessed and charged on the tax duplicate of said county; that thereupon said auditor proceeded, as required by section 2766 of the Revised Statutes of Ohio, to fix the total value of said shares according to their true value in money, and fixed the same at $74,710.00, exclusive of the assessed value of plaintiff's real estate, and made out and transmitted to the annual board of equalization of incorporated banks a copy of the report so made by said cashier, together with the valuation of such shares as was fixed by said auditor; that said state board of equalization, acting under sections 2808 and 2809 of the Revised Statutes of Ohio, did examine the return aforesaid, made by said cashier to said county auditor, and the value of such shares as fixed by said county auditor, and did equalize said shares to their true value in money, and fixed the valuation thereof at $74,710.00, exclusive of the assessed value of plaintiff's real estate, and the auditor of said State did certify said valuation to the auditor of said county of Lorain, which said auditor of said county did enter upon the tax duplicate of said county for the year 1893.

"Fifth. That the following named stockholders of said bank were on the said day next preceding the second Monday of April, 1893, the owners of the number of shares of stock of said bank set opposite their respective names, to wit:

S. S. Warner	150 shares.
R. A. Horr	10 shares.
W. Cushion, Jr.	50 shares.
C. W. Horr	120 shares.
O. P. Chapman	10 shares.
E. F. Webster	10 shares.
W. R. Wean	20 shares.
S. K. Laundon	120 shares.

"That said shares were valued by said state board of equalization for the year 1893 at $36,607.90, and certified by said board to the auditor of Lorain County as the taxable value of the same; that the rate of taxation for all taxes

assessed and collected for the year 1893 within said county and village was $0.0255 on a dollar's valuation, and amounted on said value of said shares to $933.50.

"Sixth. That on said day next preceding said second Monday of April, 1893, and at the time the cashier of said banking association made return to the auditor of said county of the names and residences of the shareholders of said association, with the numbers and par value of the shares of capital stock of said banking association for the year 1893, to wit, between the first and second Mondays of May of said year, each of said above named shareholders was indebted and owing to others of legal *bona fide* debts a sum in excess of the credits, from which, under the laws of Ohio, he was entitled to deduct said debts to an amount equal to the value of said shares. That proof of said indebtedness was duly made to said auditor by the shareholders aforesaid at the time that the valuation of said shares of stock was so fixed by him, and that said auditor refused to allow the deduction of any indebtedness of said shareholders from the value of said shares, as so fixed by said board of equalization, and the auditor of said county carried upon the duplicate delivered to the treasurer the entire valuation of said shares so made without allowing any deductions therefrom, by reason of any *bona fide* indebtedness of said shareholders to others, from the valuation so fixed by said board of equalization.

"Seventh. That the plaintiff tendered to said treasurer of Lorain County on the 28th day of December, 1893, and offered to pay to said treasurer, the sum of $485.80, if he would receive the same in full for the tax assessed upon the valuation of the shares of stock owned by the shareholders named in the petition for the entire year of 1893, and said treasurer refused to accept the same, and said treasurer intends, if not enjoined by this court, to use all lawful means for the collection of said tax so assessed upon the valuation of said shares of stock."

The court also found as a conclusion of law from the above facts that the injunction should be denied and the petition dismissed. The plaintiff appealed to the circuit court

of Lorain County, where, after argument, the judgment for defendant was reversed and judgment ordered for plaintiff enjoining the collection of the tax. The defendant, the treasurer of Lorain County, brought the case to the Supreme Court of the State, where, after hearing, the court reversed the circuit court and affirmed the judgment of the common pleas dismissing the petition. *Chapman* v. *National Bank of Wellington*, 56 Ohio St. 310.

The state law on the subject of taxation, so far as it may be claimed to in any way affect the question, is contained in the various sections of the Revised Statutes of Ohio, which are set out in the margin.[1]

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[1] Section 2730 gives definitions of the terms used in the article relating to taxation. This section is not set out in so many words, but as therein used the following terms are thus defined:

a. "Real property" and "lands" mean not only land itself, but everything connected therewith in the way of buildings, structures and improvements, and all rights and privileges appertaining thereto.

b. "Investment in bonds" includes moneys in bonds or certificates of indebtedness of whatever kind, issued by incorporated or unincorporated companies, towns, cities, villages, townships, counties, States or other incorporations, or by the United States.

c. "Investment in stocks" includes all moneys invested in the capital or stock of any association, corporation, joint stock company or other company, where the capital or stock is divided into shares, transferable by each owner without the consent of the other shareholders, for the taxation of which no special provision is made by law.

d. "Personal property" includes (1) every tangible thing the subject of ownership, whether animate or inanimate, other than money, and not forming part or any parcel of real property; (2) the capital stock, undivided profits and all other means not forming part of the capital stock of a company, whether incorporated or unincorporated, and all interest in such stock, profits or means, including shares in a vessel as therein stated; (3) money loaned on pledge or mortgage of real estate, although a deed may have been given, provided the parties consider it as security merely.

e. The term "moneys" includes surplus or undivided profits held by societies for savings or banks having no capital stock, gold and silver coin, bank notes of solvent banks in actual possession, and every deposit which the person owning, holding in trust, or having the beneficial interest therein, is entitled to withdraw in money on demand.

f. The term "credits" means the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or service due or to become due to the person liable to pay the tax thereon,

Counsel for Parties.

Mr. W. W. Boynton for plaintiff in error.

Mr. F. S. Monnett and *Mr. S. W. Bennett* for defendant in error.

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including deposits in banks, or with persons in or out of the State, other than such as are held to be money as defined in this section, when added together, (estimating every such claim or demand at its true value in money,) over and above the sum of legal *bona fide* debts owing by such person; but in making up the sum of such debts owing, no obligation can be taken into account: (1) to any mutual insurance company; (2) for any unpaid subscription to the capital stock of any joint stock company; (3) for any subscription for any religious, scientific or charitable purpose; (4) for any indebtedness acknowledged unless founded upon some consideration actually received and believed at the time of making the acknowledgment to be a full consideration therefor; (5) for any acknowledgment made for the purpose of diminishing the amount of credits to be listed for taxation; (6) for any greater amount or portion of any liability as surety than the person required to make the statement of such credits believes that such surety is in equity bound to pay, etc.

Other sections read as follows:

SEC. 2736. Each person required to list property shall, annually, upon receiving a blank for that purpose from the assessor, or within five days thereafter, make out and deliver to the assessor a statement, verified by his oath, as required by law, of all the personal property, moneys, credits, investments in bonds, stocks, joint stock companies, annuities or otherwise, in his possession, or under his control, on the day preceding the second Monday of April of that year, which he is required by law to list for taxation, either as owner or holder thereof, or as parent, husband, guardian, trustee, executor, administrator, receiver, accounting officer, partner, agent, factor or otherwise; and also of all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, held on said day by another, residing in or out of this State, for and belonging to the person so listing, or any one residing in this State, for whom he is required by law to list, and not listed by such holder thereof, for taxation in this State.

SEC. 2737. Such statement shall truly and distinctly set forth, first, the number of horses, and the value thereof; second, the number of neat cattle, and the value thereof; third, the number of mules and asses, and the value thereof; fourth, the number of sheep, and the value thereof; fifth, the number of hogs, and the value thereof; sixth, the number of pleasure carriages (of whatever kind), and the value thereof; seventh, the total value of all articles of personal property, not included in the preceding or succeeding classes; eighth, the number of watches, and the value thereof; ninth, the number of piano fortes and organs, and the value thereof; tenth, the average value of the goods and merchandise which such

Opinion of the Court.

MR. JUSTICE PECKHAM, after stating the facts, delivered the opinion of the court.

Complaint is made in behalf of the shareholders of the national bank in question that they are, by means of the sys-

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person is required to list as a merchant; eleventh, the value of the property which such person is required to list as a banker, broker or stock jobber; twelfth, the average value of the materials and manufactured articles which such person is required to list as a manufacturer; thirteenth, moneys on hand or on deposit subject to order; fourteenth, the amount of credits as hereinbefore defined; fifteenth, the amount of all moneys invested in bonds, stocks, joint stock companies, annuities or otherwise; sixteenth, the monthly average amount or value, for the time he held or controlled the same, within the preceding year, of all moneys, credits or other effects, within that time invested in or converted into bonds or other securities of the United States or of this State, not taxed, to the extent he may hold or control such bonds or securities on said day preceding the second Monday of April; and any indebtedness created in the purchase of such bonds or securities shall not be deducted from the credits under the fourteenth item of this section; but the person making such statements may exhibit to the assessor the property covered by the first nine items of this section, and allow the assessor to affix the value thereof, and in such case the oath of the person making the statement shall be in that regard only that he has fully exhibited the property covered by said nine items.

SEC. 2746. Personal property of every description, moneys and credits, investments in bonds, stocks, joint stock companies or otherwise, shall be listed in the name of the person who was the owner thereof on the day preceding the second Monday of April, in each year; but no person shall be required to list for taxation any share or shares of the capital stock of any company, the capital stock of which is taxed in the name of such company.

UNINCORPORATED BANKS AND BANKERS.

SEC. 2758. Every company, association or person, not incorporated under any law of this State or of the United States, for banking purposes, who shall keep an office or other place of business, and engage in the business of lending money, receiving money on deposit, buying and selling bullion, bills of exchange, notes, bonds, stocks or other evidence of indebtedness, with a view to profit, shall be deemed a bank, banker or bankers, within the meaning of this chapter.

SEC. 2759. All unincorporated banks and bankers shall annually, between the first and second Mondays of May, make out and return to the auditor of the proper county, under oath of the owner or principal officer or manager thereof, a statement setting forth:

First. The average amount of notes and bills receivable, discounted or

tem of taxation adopted and enforced in the State of Ohio, subjected to taxation at a greater rate than is imposed upon other moneyed capital in the hands of individual citizens,

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purchased in the course of business, by such unincorporated bank, banker or bankers, and considered good and collectible.

Second. The average amount of accounts receivable.

Third. The average amount of cash and cash items in possession or in transit.

Fourth. The average amount of all kinds of stocks, bonds, including United States government bonds or evidences of indebtedness, held as an investment or in any way representing assets.

Fifth. The amount of real estate at its assessed value.

Sixth. The average amount of all deposits.

Seventh. The average amount of accounts payable, exclusive of current deposit accounts.

Eighth. The average amount of United States government and other securities that are exempt from taxation.

Ninth. The true value in money of all furniture and other property not otherwise herein enumerated. From the aggregate sum of the first five items above enumerated the said auditor shall deduct the aggregate sum of the fifth, sixth, seventh and such portions of the eighth items as are by law exempt from taxation, and the remainder thus obtained, added to the amount of item nine, shall be entered on the duplicate of the county in the name of such bank, banker or bankers, and taxes thereon shall be assessed and paid the same as provided for other personal property assessed and taxed in the same city, ward or township.

Sec. 2759*a*. The said bank, banker or bankers shall, at the same time, make statement under oath of the amount of capital paid in or employed in such banking business, together with the number of shares or proportional interest each shareholder or partner has in such association or partnership.

Incorporated Banks.

Sec. 2762. All the shares of the stockholders in any incorporated bank or banking association, located in this State, whether now or hereafter incorporated or organized under the laws of this State or of the United States, shall be listed at their true value in money, and taxed in the city, ward or village where such bank is located, and not elsewhere.

Sec. 2763. The real estate of any such bank or banking association shall be taxed in the place where the same may be located, the same as the real estate of individuals.

Sec. 2765. The cashier of each incorporated bank shall make out and return to the auditor of the county in which it is located, between the first and the second Monday of May, annually, a report in duplicate, under oath, exhibiting, in detail, and under appropriate heads, the resources and liabilities of such bank, at the close of business on the Wednesday next preced-

contrary to section 5219 of the Revised Statutes of the United States.

The complaint is founded upon the allegation that the owners of what is termed credits in the law of Ohio, (Rev. Stat. § 2730,) are permitted to deduct certain kinds of their debts from the total amount of their credits, and such owners are assessed upon the balance only, while no such right is given to owners of shares in national banks. The claim is that shares in national banks should be treated the same as credits, and their owners permitted to deduct their debts from the valuation. The owners of property other than credits are not permitted to deduct their debts from the valuation of that property.

It is also claimed that there is an unfavorable discrimination against the national bank shareholder and in favor of an unincorporated bank or banker.

At the outset it is plain that the system of taxation adopted in Ohio was not intended to be unfriendly to or to discriminate against the owners of shares in national banks, for, as observed by the state Supreme Court, that system was adopted long prior to the passage of the law by Congress providing for the incorporation of national banks. Under this system the owner of shares in national banks is taxed precisely like the owner of shares in incorporated state banks. Rev. Stat. Ohio, § 2762.

The main purpose of Congress in fixing limits to state taxation on investments in national banks was to render it impossible for the State in levying such a tax to create and

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ing said second Monday, together with a full statement of the names and residences of the stockholders therein, with the number of shares held by each, and the par value of each share.

SEC. 2766. Upon receiving such report the county auditor shall fix the total value of the shares of such banks according to their true value in money, and deduct from the aggregate sum so found the value of the real estate included in the statement of resources as the same stands on the duplicate, and thereupon he shall make out and transmit to the annual state board of equalization for incorporated banks a copy of the report so made by the cashier, together with the valuation of such shares as so fixed by the auditor.

fix an unequal and unfriendly competition by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the act of Congress is to be read in the light of this policy. "Moneyed capital" does not mean all capital the value of which is measured in terms of money, neither does it necessarily include all forms of investments in which the interest of the owner is expressed in money. Shares of stock in railroad companies, mining companies, manufacturing companies and other corporations are represented by certificates showing that the owner is entitled to an interest expressed in money value in the entire capital and property of the corporation; but the property of the corporation which constitutes this invested capital may consist mainly of real and personal property which, in the hands of individuals, none would think of calling moneyed capital, and its business may not consist in any kind of dealing in money or commercial representatives of money. This statement is taken from *Mercantile Bank* v. *New York*, 121 U. S. 138, 155. That case has been cited with approval many times, especially in *First National Bank of Garnett* v. *Ayers*, 160 U. S. 660, and in *Aberdeen Bank* v. *Chehalis County*, 166 U. S. 440.

The result seems to be that the term "moneyed capital," as used in the Federal statute, does not include capital which does not come into competition with the business of national banks, and that exemptions from taxation, however large, such as deposits in savings banks or moneys belonging to charitable institutions, which are exempted for reasons of public policy and not as an unfriendly discrimination as against investments in national bank shares, cannot be regarded as forbidden by the Federal statute.

The case last cited contains a full and careful reference to most of the prior cases decided in this court upon the subject, and gives the meaning (as above stated) of the term "moneyed capital," when used in the Federal statute.

With no purpose to discriminate against the holders of shares in national banks, and with the taxation of the shareholders in the two classes of banks, state and national, pre-

cisely the same, the question is whether this system of taxation in Ohio, in its practical operation, does materially discriminate against the national bank shareholder in the assessment upon his bank shares?

Under the Ohio law the shares in national and also in state banks are what is termed stocks or investments in stocks, and are not credits from which debts can be deducted. As between the holders of shares in incorporated state banks and national banks on the one hand, and unincorporated banks or bankers on the other, we find no evidence of discrimination in favor of unincorporated state banks or bankers. In regard to this latter class, there is no capital stock so-called, and section 2759 of the Revised Statutes therefore makes provision, in order to determine the amount to be assessed for taxation, for deducting the debts existing in the business itself from the amount of moneyed capital belonging to the bank or banker and employed in the business, and the remainder is entered on the tax book in the name of the bank or banker, and taxes assessed thereon. This does not give the unincorporated bank or banker the right to deduct his general debts disconnected from the business of banking and not incurred therein from the remainder above mentioned. It cannot be doubted that under this section those debts which are disconnected from the banking business cannot be deducted from the aggregate amount of the capital employed therein. The debts that are incurred in the actual conduct of the business are deducted so that the real value of the capital that is employed may be determined and the taxes assessed thereon.

This system is, as nearly as may be, equivalent in its results to that employed in the case of incorporated state banks and of national banks. Under the sections of the Revised Statutes which relate to the taxation of these latter classes of banks (§§ 2762, etc.) the shares are to be listed by the auditor at their true value in money, which necessarily demands the deduction of the debts of the bank, because the true value of the shares in money is necessarily reduced by an amount corresponding to the amount of such debts. In order to arrive at their true value in money the bank returns to the auditor

the amount of its liabilities as well as its resources. Thus in both incorporated and unincorporated banks the same thing is desired, and the same result of assessing the value of the capital employed in the business, after the deduction of the debts incurred in its conduct, is arrived at in each case as nearly as is possible, considering the difference in manner in which the moneyed capital is represented in unincorporated banks as compared with incorporated banks which have a capital stock divided into shares. That mathematical equality is not arrived at in the process is immaterial. It cannot be reached in any system of taxation, and it is useless and idle to attempt it. Equality, so far as the differing facts will permit, and as near as they will permit, is all that can be aimed at or reached. That measure of equality we think is reached under this system. So far as this point is concerned, it is entirely plain there is no discrimination between unincorporated banks and bankers on the one hand and holders of shares in national banks on the other.

If the value of national bank shares is increased by reason of the franchises of the bank itself, as claimed by the plaintiff in error, while no such added value obtains in the case of unincorporated banks, there is no discrimination against bank shareholders on that account. This is simply a case where added elements of value exist in the national bank shares which are absent in the case of unincorporated banks, but in both cases all the debts of the business itself are deducted from the capital employed before reaching the sum which is assessed for taxation, and in neither case can the debts of the individual, simply as an individual, be deducted from the value of the capital assessed for taxation.

The court below did not hold, as erroneously suggested by counsel for plaintiff in error, that as the state and national banks were placed on an exact equality regarding taxation, therefore there was no discrimination made against national banks, and in favor of other moneyed capital in the hands of individual citizens. The state court said upon this subject that if the state and national banks were treated equally, the latter were not assessed at a greater rate than the former;

that national bank shareholders were not, in such event, illegally assessed, *unless* there were a clear discrimination in favor of moneyed capital other than that employed in either state or national banks. This statement, we think, is plainly correct.

The question recognized by the state court, therefore, remains whether there is any such discrimination?

The chief ground for maintaining that there is, exists in the fact that the owner of what is termed "credits" in the statute is permitted to deduct certain classes of debts from the sum of those credits, upon the remainder of which taxes are to be assessed, while the national bank shareholder is not permitted to deduct his debts from the value of his shares upon which he is assessed for taxation.

It is claimed in substance that all credits are moneyed capital, and that they are large enough in amount, when compared with the moneyed capital invested in national banks, to become an illegal discrimination against the holders of such shares.

There is no finding of the trial court upon the subject of the total amount of credits in the State. Reference was made on the argument to the report of the auditor of the State for 1893, from which it is said to appear that the total credits, after deducting the debts allowed, were $106,000,000 or $111,000,000, the amounts differing to that extent as presented by the counsel for the different parties. The case does not show that the trial court received the report in evidence, and nothing in any finding has reference in any way to that report. We do not think it is a document of which we can take judicial notice or that we could refer to any statement or alleged fact contained therein, unless such fact were embraced in the finding of facts of the trial court upon which we must decide this case.

However, if we were to look at this report we should then see that the total credits do not show what portion of those credits consists of moneyed capital in the hands of individuals which in fact enters into competition for business with national banks. It is only that kind of moneyed capital which this

court, in its decisions above cited, holds is moneyed capital within the meaning of the act of Congress.

Indeed, there is no evidence as to what the total moneyed capital in the hands of individual citizens, and included in the term "credits," amounts to even under the widest definition of that term.

In looking at the statutory definition of the term "credits" we find that so far from its including all legal claims and demands of every conceivable kind, except investments in bonds of the classes described in section 2730, and investments in stocks, it does not include any claim or demand for deposits which the person owning, holding in trust or having the beneficial interest therein, is entitled to withdraw in money on demand, nor the surplus or undivided profits held by societies for savings or banks having no capital stock, nor bank notes of solvent banks in actual possession, and from the credits as defined their owner cannot deduct certain kinds of indebtedness therein mentioned. It cannot be contended that all credits, as defined in the statute, are moneyed capital within the meaning of the act of Congress. The term "credits" includes among other things, as stated in the statute, "all legal claims and demands . . . for labor or service due or to become due to the person liable to pay taxes thereon." These claims are not in any sense of the statute moneyed capital. They include all claims for professional or clerical services, as well as for what may be termed manual labor, and their total must amount to a large sum. What proportion that total bears to the whole sum of credits we do not know, and the record contains no means of ascertaining.

It is impossible to tell from anything appearing in the record what proportion of the whole sum of credits consists of moneyed capital within the meaning of the Federal act. We know that claims for labor or services do not consist of that kind of capital. We also know that there are probably large amounts of other forms of property which might enter into the class of credits as defined in the act which would not be moneyed capital within the meaning of the act of Congress, as that meaning has been defined by this court in

the cases above cited. It is thus seen that there are large and unknown amounts of what are in the act termed "credits" which are not moneyed capital, and that the total amount of credits which are moneyed capital, within the definition given by this court to that term, is also unknown. That portion of credits which is not moneyed capital, as so defined, does not enter into the question, because the comparison must be made with other moneyed capital in the hands of individual citizens. We are thus wholly prevented from ascertaining what proportion the moneyed capital of individual citizens, included in the term "credits" (and from which some classes of debts can be deducted) bears to the amount invested in national bank shares. We are, therefore, unable to say whether there has or has not been any material discrimination such as the Federal statute was enacted to prevent. We cannot see upon these facts any substantial difference between this case and that of *Bank of Garnett* v. *Ayers*, 160 U. S. 660, and *Aberdeen Bank* v. *Chehalis County*, 166 U. S. 440, and *Bank of Commerce* v. *Seattle*, 166 U. S. 463.

As a result we find in this record no means of ascertaining whether there is any unfavorable discrimination against the shareholders of national banks in the taxation of their shares, and in favor of other moneyed capital in the hands of individual citizens. There is nothing upon the face of these statutes which shows such discrimination, and therefore it would seem that the plaintiff in error has failed to make out a case for the intervention of the court.

It is stated, however, that this specific question has been otherwise decided in *Whitbeck* v. *Mercantile National Bank of Cleveland*, 127 U. S. 193. If this were true, we should be guided by and follow that decision. Upon an examination of the case it is seen that the court gave chief attention to the question whether an increase in the value of the shares in national banks made by the state board of equalization, from sixty per cent of their true value in money, as fixed by the auditor of Cuyahoga County, to sixty-five per cent, as fixed by the board, (other property being valued at only sixty per cent,) amounted to such a discrimination in the taxation of the

shareholders of such banks as is forbidden by the Federal statute. It was held that it did.

Coming to the question of the deduction of the *bona fide* indebtedness of shareholders, the court assumed that under the statute of Ohio owners of all moneyed capital other than shares in a national bank were permitted to deduct their *bona fide* indebtedness from the value of their moneyed capital, but that no provision for a similar deduction was made in regard to the owner of shares in a national bank, and it was held that the owners of such shares were entitled to a deduction of their indebtedness from the assessed value of the shares as in the case of other moneyed capital. The point to which the court chiefly directed its attention related to the question whether a timely demand had been made for such deduction of indebtedness. It was held that it was made in time, for the reason that the court below expressly found that "the laws of Ohio make no provision for the deduction of the *bona fide* indebtedness of any shareholder from the shares of his stock, and provide no means by which such deduction could be secured." As a demand at an earlier period would have been useless, the court held it unnecessary.

An examination of the statutes of Ohio in regard to taxation shows that debts can only be deducted from credits, and how much of credits is moneyed capital is unknown. The case is not authority adverse to the principle we now hold.

For the reasons already stated, we think the judgment in this case should be

Affirmed.